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In The
Supreme Court of the United States

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION and MICHAEL SCHUH,

Petitioners,

v.

DAVID A. CLARK JR., and EILEEN RICHARDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Connick v. Myers*, 461 U.S. 138 (1983), permit the Seventh Circuit to emphasize the motivation for speech by a public employee when determining whether that employee spoke on a matter of public concern?

2. Whether a public employee's speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection by *Garcetti v. Ceballos*, 547 U.S. 410 (2006)?

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OPINIONS BELOW

Petitioners respectfully request that a writ of certiorari be issued to review the judgment below. The opinion of the United States Court of Appeals for the Seventh Circuit appears in the Appendix (hereinafter "App.") at App. 1-25 and is reported at 574 F.3d 370 (7th Cir. 2009). The opinion of the United States District Court for the Eastern District of Wisconsin, docket No. 06-C-900, appears at App. 26-60 and is unpublished. The judgment entered by the Eastern District of Wisconsin dismissing the action appears at App. 61-62.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on July 21, 2009. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the entry of the judgment. No petition for rehearing was filed. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Factual Background[1]

In May 2005, the Milwaukee County Deputy Sheriff's Association ("MDSA"), the union that represents all Deputy Sheriffs and Sergeants in the Milwaukee County Sheriff's Department ("Department"), learned that Milwaukee County Sheriff David A. Clarke Jr. ("Sheriff Clarke") had directed on-duty deputies to escort him to and from Milwaukee's General Mitchell International Airport, and to conduct patrols of his personal residence. MDSA President, Deputy Roy Felber, believing this to be an improper and wasteful personal use of resources met with a reporter from the *Milwaukee Journal Sentinel* to express his concerns.

Shortly thereafter, Sheriff Clarke posted a quote on roll-call boards throughout the Department. This quotation was confrontational and seemed to attack the courage of members of the department. It said, "[i]f you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others. Deuteronomy, Chapter 20, Verse 8."

Deputy Michael Schuh ("Deputy Schuh"), an eighteen-year veteran of the Sheriff's Department read Sheriff Clarke's message, and believed that Sheriff Clarke was personally challenging the courage of the entire department. In response to Sheriff Clarke's quote, Deputy Schuh submitted a statement to the *Star*, the MDSA newsletter. The *Star* regularly contains editorials and commentary from deputies,

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[1]As the facts of this case are not in dispute, they are drawn from the Seventh Circuit decision. *See* App. 2-8.

including criticism of Sheriff Clarke. It is distributed to approximately 700 current and retired MDSA members, as well as private businesses, sponsors, and the Milwaukee County Board of Supervisors, which controls the Department's budget. Deputy Schuh's article stated:

> Union Member's Response
> If you are afraid or you have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

Deputy Schuh learned of Sheriff Clarke's use of deputies to patrol his residence by viewing an order for that assignment on a roll-call board, and of Sheriff Clarke's personal escort at the airport through the "grapevine."

On Friday, July 22, 2005, the MDSA distributed the edition of the *Star* containing Deputy Schuh's article. Prior to reading the article, Sheriff Clarke did not know Deputy Schuh. After reading the article, Sheriff Clarke and his second-in-command, Inspector Kevin Carr, discussed an appropriate response.

Sheriff Clarke decided to reassign Deputy Schuh to a new "Pilot Project," which he created specifically for Deputy Schuh on Saturday, July 23, 2005. This project required Deputy Schuh to patrol part of Milwaukee on foot, in full uniform, and perform various community outreach tasks. The specific area of Deputy Schuh's new assignment was decided by Sheriff Clarke on Sunday, July 24, 2005, after reading a *Milwaukee*

Journal Sentinel article which included a map detailing a crime-ridden section of Milwaukee's north side. This neighborhood was described as "the City's deadliest area," and "Milwaukee's hot spot" for crime.

Deputy Schuh received his new assignment on Monday, July 25, 2005. The location of his patrol precisely matched the area highlighted in the *Milwaukee Journal Sentinel* article. Deputy Schuh was assigned to this area in full uniform, without a partner, and without a car. He was required to ride public transportation to and from his new assignment. There was no advance notice of this new assignment as required by the collective bargaining agreement between the MDSA and Milwaukee County.

On July 28, 2005, Sheriff Clarke issued Directive No. 13-05, which revised the Department's Confidentiality Policy, originally enacted in 1984. This revised policy (hereinafter "Confidentiality Policy") was drafted by Captain Eileen Richards ("Captain Richards") and relied in large part on an unimplemented 2002 proposal.

The new policy differed from the old policy. Employees were now required to "keep official agency business confidential" rather than "keep departmental business confidential." Employees were prohibited from disclosing such information "to anyone except those for whom it is intended, or as directed by the Sheriff or his designee, or as ordered by law." Under the old policy a deputy's immediate supervisor could approve communications. (App. 20)

Sheriff Clarke's reassignment of Deputy Schuh caused an uproar throughout Milwaukee. On July 27, 2005, the Milwaukee County Board of Supervisors issued an open letter to Sheriff Clarke criticizing his fiscal irresponsibility and expressing their disgust at

his actions. On that same day Deputy Schuh and the MDSA filed their initial suit.

Proceedings Below

This matter was originally commenced as a federal action on July 25, 2005, in the United States District Court for the Eastern District of Wisconsin pursuant to 42 U.S.C. § 1983. Plaintiffs-petitioners Deputy Schuh and the MDSA alleged that defendants-respondents, David A. Clarke, Jr., in his official capacity as the Sheriff of Milwaukee County, and Captain Richards, in her official capacity as an employee of Milwaukee County and the Milwaukee County Sheriff's Office, had violated their constitutional rights. The suit sought a temporary restraining order and a permanent injunction in addition to other remedies. On August 4, 2005, a summons was served on both respondents. On October 6, 2005, before the court had set the matter for hearing on the restraining order, the parties filed a stipulation to dismiss without prejudice.

The petitioners then filed this suit on October 7, 2005, in the Circuit Court for Milwaukee County, Wisconsin, against the respondents. On August 2, 2006, the plaintiffs filed an amended complaint under 42 U.S.C. § 1983, alleging that the defendants violated Deputy Schuh's First Amendment rights of free speech and free association due to the reassignment, and that the Department's new Confidentiality Policy constituted an impermissible prior restraint on speech. The amended complaint also alleged similar state law claims arising out of the Wisconsin Constitution. On August 17, 2006, the defendants removed the case to the United States District Court for the Eastern District of Wisconsin pursuant to federal subject

matter jurisdiction under 28 U.S.C. § 1441.

In accordance with 28 U.S.C. § 636(c) and Rule 73(b) of the Federal Rules of Civil Procedure, on August 18, 2006, and August 21, 2006, the respondents and petitioners, respectively, consented to proceed before the Honorable Patricia Gorence, United States Magistrate Judge.

The parties filed cross-motions for summary judgment. The district court ruled in favor of Sheriff Clarke and Captain Richards on all federal claims in a final judgment dated August 15, 2008, and entered August 18, 2008. According to the district court, Deputy Schuh had spoken as a citizen, but not on a matter of public concern. (App. 47-48). The court held that while some of the issues raised in Deputy Schuh's article were matters of public concern, the context of the article revealed that "his 'purpose was to advance his personal interests.'" (App. 51) (citing *Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006)). The court noted that the petitioners had not provided any evidence, "that the point of Deputy Schuh's speech was to raise a matter of public concern." (App. 51).

The court declined to exercise supplemental jurisdiction over the state law claims and dismissed the action. On September 5, 2008, the petitioners filed a Notice of Appeal and docketing statement with the United States District Court for the Eastern District of Wisconsin.

On February 13, 2009, oral arguments were heard before the Honorable Justices Michael S. Kanne, Ilana Diamond Rovner, and Terence T. Evans, of the United States Court of Appeals for the Seventh Circuit. On July 21, 2009, the panel issued its decision affirming the district court's decision that Deputy Schuh's speech was not on a matter of public concern, and that he could not sustain a First Amendment retaliation claim.

The Seventh Circuit held that both the content and form of Deputy Schuh's article related to a matter of public concern. (App. 13-14). However, after looking at the context of the speech, the court determined that Deputy Schuh was speaking on a matter of purely private concern, and therefore his speech was not protected by the First Amendment. (App. 19). The court held that the context of the statement was more important because Deputy Schuh had not directly questioned Sheriff Clarke's fiscal responsibility or raised the public ramifications of his conduct. (App. 14).

The Seventh Circuit characterized its analysis of Deputy Schuh's motive for speaking as not applying a litmus test, but stated, "[t]he motive of a statement, rather, 'matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the only *point* of the speech was to further some purely private interest.'" (App. 12) (emphasis in original) (quoting *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002)). The court said it was required to analyze the extent that Deputy Schuh's speech was made for personal reasons in conjunction with the extent to which the content related to a matter of public concern. (App. 14). The Seventh Circuit stated, "[i]n the end, Schuh cannot avoid that he wrote his short statement, which on its face merely questioned Sheriff Clarke's courage, for purely personal reasons." (App. 19).

The Seventh Circuit also affirmed the district court's decision concerning the new Confidentiality Policy. The circuit court held that the Confidentiality Policy "is not an unlawful prior restraint because it does not apply to speech protected by the First Amendment."

(App. 22-23). Rather, the policy only regulated speech grounded in the public employee's job duties. (App. 23). This petition for writ of certiorari timely followed.

REASONS FOR ALLOWANCE OF THE WRIT

The appropriate amount of emphasis given to a public employee's motivation for speaking in determining whether he or she spoke on a matter of public concern is an important question requiring the guidance of this Court. This question implicates the free speech rights of public employees across the United States. In addressing this question the courts of appeals have split. The Seventh Circuit's affirmance of summary judgment against Deputy Schuh and the MDSA conflicts in various respects with the decisions of other circuits that have examined the matter. Furthermore, the Seventh Circuit's decision conflicts with the binding precedents of this Court as stated in *Connick v. Myers*, 461 U.S. 138 (1983); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam); and *Rankin v. McPherson*, 483 U.S. 378 (1987). Petitioners respectfully contend that the Seventh Circuit, along with the Fifth, Sixth, and Eleventh Circuits have erroneously interpreted these precedents in such a way as to limit the free speech rights of public employees by focusing on the motivation for the speech in question, as opposed to applying the three-part test of content, form, and context test created by this Court. *Connick*, 461 U.S. at 147-48.

The free speech rights of public employees are further implicated by the question of whether speech made by a public employee as a citizen, but based on information learned through public employment, is protected by the Constitution. The petitioners contend that the Seventh Circuit's application of *Garcetti v.*

Ceballos, 547 U.S. 410 (2006), has expanded the reasoning of that case in such a way as to disqualify certain speech by public employees made as citizens on matters of public concern from protection. Review by this court is warranted to clarify the holding of *Garcetti* and provide guidance to public employees throughout the United States.

I. REVIEW IS NECESSARY TO CLARIFY THE APPROPRIATE EMPHASIS GIVEN TO A PUBLIC EMPLOYEE'S MOTIVATION FOR SPEAKING IN DETERMINING WHETHER THAT EMPLOYEE SPOKE ON A MATTER OF PUBLIC CONCERN.

A. The Seventh Circuit misinterprets and improperly applies *Connick* and its progeny.

The Seventh Circuit determined that Deputy Schuh did not speak on a matter of public concern when he published his article in the *Star*. This holding resulted in the granting and affirming of summary judgment against him by the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin. Petitioners respectfully contend that this holding was based on an erroneous application of Supreme Court precedent. The Seventh Circuit put extensive emphasis on Deputy Schuh's motivation for speaking, despite Supreme Court precedent to the contrary. The Seventh Circuit has emphasized the motivation for public employee speech on multiple occasions. Furthermore, numerous courts of appeals have addressed this issue in conflicting ways.

1. The Supreme Court's analysis of whether a public employee's speech is on a matter of public concern does not turn on the personal motivation for that speech.

This Court has repeatedly stated that public employees do not surrender all of their First Amendment rights because of their employment. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). In certain circumstances, a public employee has the First Amendment right to speak as a citizen on a matter of public concern. *Id.* (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995) (hereinafter *NTEU*)).

The Court's seminal case in defining the right of public employees to speak on matters of public concern is *Pickering*. In that case, a teacher was retaliated against for writing a letter to a local newspaper on issues that included the funding policies of his school and the requirements for certain tax revenues. *Pickering*, 391 U.S. at 566. The Court stated that the issue in the case was, "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The statements at issue were found to have "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom, or to have interfered with the regular operation of the school generally." *Id.* at 572-73 (footnote omitted). The

case focused on balancing the respective interests of the employee and employer, not on the teacher's motivation for speaking out against the school board. *Id.* at 572-73.

The balancing test developed in *Pickering* was refined in *Connick v. Myers*, 461 U.S. 138 (1983). The case involved an Assistant District Attorney for New Orleans Parish in Louisiana, Sheila Myers, who was strongly opposed to a proposed transfer within the criminal court. *Connick*, 461 U.S. at 140. In an attempt to gather information to oppose her transfer, Ms. Myers created and circulated a fourteen-question survey concerning the New Orleans Parish office. *Id.* at 141. She was then terminated by District Attorney Harry Connick for refusing to accept the transfer and for insubordination as a result of her questionnaire. *Id.*

Before scrutinizing the reasons for the discharge, the Court determined whether the speech at issue could be fairly characterized as constituting speech on a matter of public concern. *Id.* at 146. The reason for this was because, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices." *Id.* On the other hand, employee speech on matters of purely personal interest is not entitled to protection. *Id.* at 147. In order to determine whether an employee's speech addresses a matter of public concern, courts were directed to look at the content, form, and context of a given statement, as revealed by the whole record. *Id.* at 147-48.

Applying this test, the Court found that thirteen of the fourteen questions contained in the questionnaire prepared by Ms. Myers were not on matters of public concern. *Id.* at 148. These thirteen questions related to internal office matters such as morale, transfer

policies, the need for a grievance committee, and the level of trust and confidence in various supervisors. *Id.* One question did touch upon a matter of public concern, whether any of the assistant district attorneys had ever felt pressured to work in political campaigns on behalf of office supported candidates. *Id.* at 149. This question was put through the *Pickering* balancing analysis because it passed the Court's new test. *Id.* at 150-54. Applying the *Pickering* balancing test, the Court held that Mr. Connick was justified in firing Ms. Myers, despite the fact that her speech touched upon a matter of public concern. *Id.* at 154.

In *Connick*, as in *Pickering*, the Court was not concerned with the motivation for the speech in question. The Court stated that, "the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Id.* at 148. Despite Ms. Myers' personal motivation for circulating the survey, the Court put the single question that was found to be on a matter of public concern through the *Pickering* balancing test. *Id.* at 149-50.

Motive for speaking was even less of an issue in *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a clerical employee in the office of the Constable of Harris County, Texas, Ardith McPherson, was discharged for making a personal statement to a fellow employee that was inadvertently overheard by a third employee. *Id.* at 381-82. After hearing that an attempt had been made on the life of President Reagan, she stated that, "if they go for him again, I hope they get him." *Id.* at 381.

The Court held that the statement made by Ms. McPherson to the fellow employee concerning her personal feelings constituted speech on a matter of public concern. "Considering the statement in context,

as *Connick* requires, discloses that it plainly dealt with a matter of public concern." *Id.* at 386. This statement was then put through the *Pickering* balancing test and the Court concluded that Ms. McPherson's dismissal had been improper. *Id.* at 392. There was no discussion of her motivation for speaking on this issue. The inadvertently overheard statement was made to a fellow employee in supposed confidence, and therefore seemed to have a purely personal motivation.

Public employee speech on matters of public concern was addressed in *NTEU*, 513 U.S. 454 (1995). In *NTEU*, employees of the Executive Branch challenged a federal statute which forbade them from receiving honoraria for public appearances, speeches, or articles. *Id.* at 459. The employees who challenged this statute had previously received compensation for writing and speaking to public audiences outside of the workplace, and the content of their speech was mostly unrelated to their Government employment. *Id.* at 466. The Court determined that this speech fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *Id.* There was no discussion of the motivation for the employees' speech. Presumably, because the employees were most often compensated for speaking on issues unrelated to their public employment, they had only a personal motive for speaking.

In *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), this Court commented on the public concern test of *Connick* and provided some guidance for its application. The Court stated that *Connick* and the cases applying it:

> make clear that public concern is something that is a subject of legitimate

> news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Id. at 83-84.

In *Roe*, the speech at issue was found not to be on a matter of public concern in that it consisted of sexually explicit performances which were linked to the speaker's employment as a police officer. *Id.* at 78. In this case, these activities did nothing to inform the public about any aspect of the police department's functioning or operation. *Id.* at 84. In holding that Officer Roe had not spoken on a matter of public concern, there was no discussion of his motivation for speaking. Instead, the Court focused on the content of his speech, its form, and the context in which it was made. Motivation did not figure into the analysis.

This Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), discussed the *Connick* test. In *Garcetti*, a supervising deputy district attorney in the Los Angeles County District Attorney's Office claimed that he was subjected to retaliation for writing two memoranda concerning an allegedly inaccurate warrant affidavit and recounting his concerns after being called by the defense in a case involving the affidavit. *Id.* at 413-15. The Court found that the dispositive factor was that the speech at issue was made pursuant to Mr. Ceballos' official duties. *Id.* at 421. "Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was

employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction." *Id.* The case turned on the point that Mr. Ceballos communicated pursuant to his official duties, his motive did not matter, instead his role was dispositive.

These cases highlight that this Court has repeatedly declined to focus on the motivation for public employee speech in determining whether the speech was on a matter of public concern. Rather, this Court has applied the *Connick* test of content, form, and context. Despite the fact that this Court has never focused on a public employee's reason for speaking, the Seventh Circuit has focused on the "point" or motivation of the speech of public employees in such a way as to restrict the free speech rights of public employees guaranteed by the First Amendment.

2. The Seventh Circuit's application of *Connick* improperly focuses on a public employee's motivation for speaking, and as a result, review by this Court is required.

The Seventh Circuit's application of *Connick*, from the beginning, has given the motivation for speech by public employees heavy weight in determining whether their speech was on a matter of public concern. In one of the first decisions following *Connick*, the Seventh Circuit interpreted *Connick* as turning on the "essentially 'private motive' for the speech." *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984). The Seventh Circuit reasoned that while one of the questions contained in the questionnaire at issue in *Connick* related to a matter of public concern, the

questionnaire on the whole did not involve speech on a matter of public concern. *Id. at 1243.* This reasoning, however, ignored the fact that the single question on a matter of public concern in *Connick* was analyzed under the *Pickering* balancing test. *Connick*, 461 U.S. at 149-50. It was only pursuant to this balancing test that the *Connick* Court considered Ms. Myers' motivation for speaking. *Id.* at 153-54. Therefore, her motivation for speaking was considered during the *Pickering* balancing test, not during the analysis of whether she had spoken on a matter of public concern.

The Seventh Circuit then interpreted *Connick* as requiring it to "look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985). In *Linhart*, an acting police chief had been reprimanded for allegedly engaging in political activity in his office by recruiting a replacement Village Manager. *Id.* at 1006. The Seventh Circuit stated that because it was not the acting police chief's intent to speak out on a matter of public concern, his speech was only of personal interest, and did not constitute protected speech. *Id.* at 1010. This early interpretation has led to a string of path-dependent decisions in which the Seventh Circuit has used the motivation for speech by a public employee to determine whether the speech was on a matter of public concern, while at the same time pointing out that it did not consider motivation to be a litmus test.

The *Linhart* interpretation of the *Connick* test has become a leading interpretation in the Seventh

Circuit.[2] In *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), *Linhart* was the basis for a decision holding that a school administrator's sexual harassment complaints did not constitute speech on a matter of public concern. *Id.* at 417. The court stated that "[w]hile the content of [the plaintiff's] communications touched upon an issue of public concern generally, she was not attempting to speak out as a citizen concerned with problems facing the school district; instead, she spoke as an employee attempting to resolve her private dilemma." *Id.* Her speech was not protected because "it was uttered in the pursuit of purely private interests." *Id.* This rationale conflicts directly with the holding in *Connick*. Ms. Myers' motive for speaking in *Connick* was "to gather ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148. Despite this personal motive, one question in her survey was put through the *Pickering* balancing analysis. In *Callaway*, the Seventh Circuit allowed the motivation of the speech to predominate and erroneously failed to apply the *Pickering* balancing test to the speech at issue.

Focusing on the motivation for public employee speech in determining whether that employee spoke on a matter of public concern is a familiar refrain in the Seventh Circuit case law.[3] This is despite frequent

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[2] As of September 15, 2009, it has been cited seventy-nine times by federal courts according to Loislaw.com, including thirty-one times by the Seventh Circuit.

[3] "Speech that serves a private or personal interest, as opposed to a public one, does not satisfy the standards for First Amendment protections." *Houskins v. Sheahan*, 549 F.3d 480, 491-92 (7th Cir. 2008) (holding that because the statement at issue was made in the context of a personal employment dispute and not aimed at

statements that motive is not dispositive, or "a litmus test," and that the content of the speech is the most important factor. (App. 12).

Nonetheless, the Seventh Circuit is not completely devoid of decisions which have rejected motivation as a key inquiry in determining whether the speech of public employees is on a matter of public concern. In a 1988 case the Seventh Circuit stated:

> [a]lthough the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive. A fair reading of *Connick* simply will not support the use of such a litmus test. Despite the Court's explicit finding that Myers's questionnaire was motivated by

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raising public awareness of any wrongdoing by the defendant, it was not on a matter of public concern). "While a statement born of pure personal interest does not constitute a public concern, a mere personal aspect of the speaker's motivation will not defeat the entire speech." *Miller v. Jones*, 444 F.3d 929, 937 (7th Cir. 2006). "[Plaintiff] provides no evidence that the point of her speech was to raise a matter of public concern, rather than to further her purely private interests." *Metzger v. DaRosa*, 367 F.3d 699, 702-03 (7th Cir. 2004) (ruling that an employee's speech was not on a matter of public concern). "Because [plaintiff's] complaints were both motivated by and framed in terms of his own interest, they did not constitute speech on a matter of public concern." *Smith v. Fruin*, 28 F.3d 646, 652 (7th Cir. 1994). *See also Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990) (holding that a public employee's speech was not on a matter of public concern because she failed to present some evidence that she publicized an issue out of concern for the public interest, and that her only concern was purely personal).

> a personal dispute, the content of her speech was paramount to the Court's finding that a public issue was implicated. This court also has recognized that content is the greatest single factor in the *Connick* inquiry.

Berg v. Hunter, 854 F.2d 238, 242-43 (7th Cir. 1988) (citation omitted). This analysis was repeated in a later case which overturned a grant of summary judgment in favor of a public employer on the basis that the district court had focused exclusively upon the employee's purpose in speaking. *Belk v. Town of Minocqua*, 858 F.2d 1258, 1263-64 (7th Cir. 1988). The court compared the complaints at issue in *Belk* with the questions in *Connick* and held that despite being bound up in a personal dispute with her employer, the speech of the public employee touched upon matters of public concern and necessitated a *Pickering* balancing analysis. *Id.* at 1264.[4]

Petitioners respectfully contend that it is the approach developed in *Linhart* that has incorrectly predominated the Seventh Circuit's analysis of whether speech by a public employee is on a matter of public concern. The Seventh Circuit improperly focused on the motivation of public employees' speech. Despite frequent statements that motive is not a litmus test, the Seventh Circuit has repeatedly held that speech is unprotected when made for personal

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[4] *See also Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) ("Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective. It does not depend entirely on the fact the plaintiffs filed a suit for damages and would benefit but also on the other factors discussed in *Connick*.").

reasons. Review by this Court is necessary to clarify the correct application of *Connick*.

B. The courts of appeals are in conflict over the proper application of *Connick*.

The courts of appeals are in disarray concerning the proper application of *Connick*. They have split regarding the emphasis given to a public employee's motivation for speaking. This split requires resolution by the Court to clarify how a public employee's motivation for speaking is to be considered in determining whether the employee spoke on a matter of public concern.

1. The Sixth, Tenth, and Eleventh Circuits have given extensive weight to a public employee's motivation for speaking in determining whether speech is on a matter of public concern.

The Eleventh Circuit has given the motivation for public employee speech extensive emphasis in its *Connick* analysis. "A court must therefore discern the purpose of the employee's speech - that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993) (per curiam). Even where the content of an employee's speech touches on a matter of social interest, the Eleventh Circuit looks to the motivation of the employee in determining whether the speech is protected. *Id.* "[T]he relevant inquiry is not whether the public would be interested in the topic of the speech at issue but rather is 'whether the purpose of the plaintiff's speech was to raise issues of public

concern.'" *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000).[5]

The Sixth Circuit also emphasizes the motivation for speech by public employees. "[O]ur court has distilled the 'public concern' test by stating that the court must determine: the 'focus' of the speech; 'the point of the speech in question'; or 'the communicative purpose of the speaker.'" *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004). This test is closer to the Seventh Circuit's application of *Connick* than the decisions of the Supreme Court.

The Tenth Circuit goes even farther in focusing its inquiry upon the employee's motivation for speaking. The employee must be speaking with an intent to improve public welfare for their speech to be on a matter of public concern. *Maldonado v. City of Altus*, 433 F.3d 1294, 1310 (10th Cir. 2006). "In deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996). This inquiry ignores that the speech in *Connick* was directed at resolving personal grievances and was made with a personal motive, not about informing the public.

2. The First, Second, and Fourth Circuits apply *Connick* without emphasizing a public employee's motivation for speaking.

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[5] *See also Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) (highlighting the need to discern the employee's purpose in speaking).

The Fourth Circuit's *Connick* jurisprudence is more protective of employee speech than that of the Seventh Circuit. In a recent case, the Fourth Circuit highlighted the need to differentiate between multiple issues raised in employee speech. While any single instance of expression must be judged as a whole, that does not require the court to "ignore the portions of the letter raising issues of sexual harassment simply because most of the letter is devoted to personal grievances." *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007). The fact that the bulk of an employee's letter was related to personal grievances was not sufficient to leave the entire letter unprotected. *Id.* at 268. Instead the Fourth Circuit takes the stance that if speech "arguably relates to a matter of public concern, we prefer to apply the approach taken in *Connick* and weigh whatever public interest commentary may be contained in the letter against the state's dual interest as a provider of public service and employer of persons hired to provide that service." *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 158 (4th Cir. 1992).

The First Circuit's application of *Connick* is also more protective of employee speech than the Seventh Circuit's. In determining whether speech is on a matter of public concern, the First Circuit looks primarily at the content of the speech. "If the employee's speech is on a topic that would qualify, 'on the basis of its content alone' as a matter of inherent public concern, we needn't inquire further into the 'form and context' of the expression." *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (quoting *O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir. 1993)). Unlike the Seventh Circuit, the First Circuit does not hold that self-interested speech is excluded from First Amendment protection. *Davignon*, 524 F.3d at 102.

The Second Circuit recently addressed the issue of motivation in determining whether the speech of public employees is on a matter of public concern. The court recognized that its *Connick* case law was not entirely clear on the issue, but stated that "a speaker's motive is not dispositive in determining whether his or her speech addresses a matter of public concern." *Sousa v. Roque*, 578 F.3d 164, 2009 U.S. App. LEXIS 18844, *25 (2d Cir. Aug. 21, 2009) (as amended Aug. 31, 2009) (citing *Reuland v. Hynes*, 460 F.3d 409, 415 (2d Cir. 2006)). This holding was compelled by the decision in *Connick*. *Id.*[6]

The First, Second, and Fourth Circuits have applied *Connick* without focusing on the motivation for public employee speech. Petitioners respectfully contend that this analysis is more faithful to the analysis used by this Court, than the analysis used by the Sixth, Seventh, Tenth, and Eleventh Circuits. The conflict between circuits warrants review by this Court to clarify the appropriate emphasis to be given to the motivation for public employee speech.

II. REVIEW IS NECESSARY TO DETERMINE WHETHER A PUBLIC EMPLOYEE'S SPEECH, BASED ON INFORMATION LEARNED THROUGH HIS EMPLOYMENT, BUT SPOKEN AS A CITIZEN, IS EXCLUDED FROM FIRST AMENDMENT PROTECTION.

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[6] *See also Reuland*, 460 F.3d at 416 ("The facts of the Supreme Court's decision in *Connick* indicate that motive is not dispositive as to whether an employee's speech is a matter of public concern.").

The Seventh Circuit determined that the Confidentiality Policy promulgated by Sheriff Clarke and Captain Richards is not an unlawful prior restraint because it does not apply to speech protected by the First Amendment. (App. 22-23). The court held that the policy regulated only speech that existed due to the employee's professional duties. This holding, however, ignores that speech by a public employee as a citizen is protected regardless of the source of information on which the speech is based. It is only when a public employee speaks on a matter of public concern pursuant to their job duties that their speech is unprotected. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (stating that the controlling factor was that Mr. Ceballos' expressions were made pursuant to his job duties). The Seventh Circuit applied *Garcetti* to uphold the Confidentiality Policy of the sheriff's department, which prohibits speech by public employees not made pursuant to their job duties.

A. *Garcetti* only applies to speech made by public employees pursuant to their job duties.

In *Garcetti*, deputy district attorney for the Los Angeles County District Attorney's Office, Richard Ceballos, was punished for writing a memorandum to his supervisor concerning inaccuracies in a police report and affidavit, and recounting his concerns about the affidavit when called by defense counsel in an evidentiary hearing. *Garcetti*, 547 U.S. at 413-15. Mr. Ceballos responded by filing suit claiming retaliation for engaging in speech protected by the First Amendment. *Id.* at 415. In granting summary judgment to the employer, the district court held that Mr. Ceballos was not entitled to First Amendment

protection for his memorandum's contents. *Id.* The Ninth Circuit reversed this judgment without considering whether Mr. Ceballos had spoken as a citizen or as an employee. *Id.* at 416. This Court in turn reversed the Ninth Circuit, reasoning that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. The memorandum was part of Mr. Ceballos' job duties, and restricting this official speech did not infringe any liberties that he might have enjoyed as a private citizen. *Id.* at 421-22. Restricting such speech reflected the "exercise of employer control over what the employer itself has commissioned or created." *Id.*

The *Garcetti* case created a new factor for determining whether speech by public employees is protected by the First Amendment. If a public employee speaks as a citizen on a matter of public concern, a careful balancing analysis is required to determine whether the speech is protected. *Id.* at 423. "When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." *Id.* The analysis from *Garcetti* does not apply to speech by a public employee made as a citizen, which is still governed by the traditional *Connick-Pickering* analysis.

B. The Seventh Circuit wrongfully expands *Garcetti* to exclude speech made by public employees as citizens from First Amendment protection.

Despite *Garcetti's* holding, the Seventh Circuit applied it to uphold a Confidentiality Policy, which restricts speech not made pursuant to the job duties of public employees. As noted in the Seventh Circuit's

decision, employee speech on behalf of an organization is not protected speech. (App. 22). Speech on behalf of an organization is made as an employee, not as a citizen. However, the Confidentiality Policy covers more than speech on behalf of the Department. The petitioners contend that the Seventh Circuit erred in holding that a requirement to keep official agency business confidential does not prohibit protected speech by an employee as a citizen.

The Seventh Circuit determined that the policy at issue regulated solely unprotected speech which owed its existence to an employee's job duties. (App. 23). The court reached this result by engaging in a close textual analysis of three words contained in the policy: official agency business. (App. 23). The Seventh Circuit determined these three words restricted the coverage of the policy to: information that was more than tangentially related to the Department (interpreting "business"); was generated by or pertained to the Department (interpreting "agency"); and restricted only speech grounded in or owing its existence to the employees' job duties, or authorized or approved by a proper authority (interpreting "official"). (App. 23). It was the interpretation of "official" that was most important to the Seventh Circuit. (App. 23).

There is no requirement in the Confidentiality Policy that covered speech consists only of speech authorized, approved, or owing its existence to the employees' job duties. Rather the policy covers speech made by employees as citizens. An employee who publicly comments on an official policy or decision of the Department, of which they learned about during their employment, could be subjected to discipline. This is regardless of whether they were speaking on behalf of the Department pursuant to their job duties, or as a citizen. There is simply no support in the

Confidentiality Policy for the assertion that the word "official" limits covered speech to that deemed unprotected by *Garcetti*. The Confidentiality Policy covers all speech about official agency business, not just speech made pursuant to an employee's job duties.

The Seventh Circuit reached this result by missing the distinction between speech which "owes its existence to a public employee's professional responsibilities,"[7] and information learned through public employment which becomes the basis for speech as a citizen. A public employee's speech about a matter of public concern, based on information learned in his employment, is protected if he speaks as a citizen. *See Garcetti*, 547 U.S. at 421 (stating that the fact that the memorandum concerned the subject matter of Mr. Ceballos' employment was not dispositive); *Connick*, 461 U.S. at 149 (holding that the question of whether fellow employees ever felt pressured to work in political campaigns on behalf of office supported candidates touched upon a matter of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979) (holding that a teacher's speech concerning desegregation policies in her district could potentially be protected); *Pickering*, 391 U.S. at 572 (describing the importance of protecting a public teacher's right to speak out on subject of school board spending). What each of these cases have in common is that the employee was speaking publicly based on information learned through public employment. This speech was eligible for First Amendment protection because each employee spoke as a citizen.

The Confidentiality Policy at issue in this case has the power to restrict and prevent speech found to be

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[7] *Garcetti*, 547 U.S. at 421.

eligible for protection in the cases cited above. It restricts speech on "official agency business" whether or not the employee is speaking as a citizen. For this reason, review is warranted to determine whether public employee speech, based on information learned through public employment, but spoken as a citizen, should be excluded from First Amendment protection.

CONCLUSION

For all the foregoing reasons petitioners respectfully request that the Supreme Court grant the petition for writ of certiorari and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-3298

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION
and MICHAEL SCHUH,

Plaintiffs-Appellants,

v.

DAVID A. CLARKE, JR.,
and EILEEN RICHARDS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 06 C 900—**Patricia J. Gorence,** *Magistrate Judge.*

ARGUED FEBRUARY 13, 2009—DECIDED JULY 21, 2009

Before KANNE, ROVNER, and EVANS, *Circuit Judges.*

KANNE, *Circuit Judge.* The dispute in this case is what one's mother might have in mind when she imparts the classic phrase, "Sticks and stones may break my bones, but words will never hurt me." Apparently, Milwaukee County Sheriff David A. Clarke, Jr., did not take this childhood lesson to heart. In the summer of 2005, Sheriff Clarke posted on a roll call bulletin board a quote that at least one deputy, Michael Schuh, considered an offensive challenge to his and his fellow officers' courage. Schuh fired back by

publishing a two-sentence statement challenging Sheriff Clarke's courage. Sheriff Clarke, apparently afraid that words *would* hurt him, quickly responded by reassigning Schuh to a newly created mission in one of Milwaukee's most crime-ridden neighborhoods.

Deputy Schuh sued Sheriff Clarke, claiming that Clarke retaliated against him for engaging in protected speech in violation of the First Amendment. Schuh also claimed that a recent change to the department's Confidentiality Policy constituted an unlawful prior restraint. We are sympathetic to Schuh's position, and we consider Sheriff Clarke's response against Schuh to be excessive. But there are limits to the First Amendment's protections when a public employee speaks, and because we find that Schuh was speaking on a matter of purely private concern, we agree with the district court that summary judgment in Sheriff Clarke's favor was appropriate.

I. Background

In late May 2005, the Milwaukee County Deputy Sheriff's Association ("MDSA"), which represents deputies and sergeants employed by the Milwaukee County Sheriff's Office, learned that Sheriff Clarke was directing on-duty officers to escort him to and from the Milwaukee airport and to conduct personalized patrols of his home. Believing the conduct to be an improper personal use of the County's limited resources—particularly during a time when money was tight—MDSA president Roy Felber conveyed the Association's concerns to a reporter from the *Milwaukee Journal Sentinel*. The record is unclear whether the newspaper published a story about the

Sheriff at that time.[1]

A few weeks later, Sheriff Clarke posted a quote on a roll-call board at the department, visible to most Sheriff's Office employees. Sheriff Clarke had posted quotations and inspirational messages in the past, but this one had a notably confrontational tone:

> If you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others.
>
> Deuteronomy, Chapter 20, Verse 8

One deputy who read Sheriff Clarke's "inspirational" post was Michael Schuh, an eighteen-year veteran officer who was then working as a bailiff. Schuh took offense to Sheriff Clarke's message, believing the Sheriff was personally challenging his own—and his brother and sister officers'—courage to perform their duties.

In response to the Sheriff's quote, Schuh submitted a two-sentence statement to the *Star*, an MDSA newsletter dedicated to publishing news and updates within the Sheriff's Office. The *Star* regularly contained editorials and commentary from deputies, including occasional criticism of Sheriff Clarke. The MDSA distributes the *Star* to approximately 700

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[1]An initial finding of fact proposed by Sheriff Clarke and Captain Richards stated ambiguously that "[a] story or two appeared in the *Journal* and also reference was made on Channel 12." (Def.'s Prop. Findings of Fact ¶ 115.) The defendants later withdrew this proposed finding as inaccurate, citing a search of a legal database for *Journal Sentinel* articles during the relevant time. Plaintiffs then disputed that there were no stories in the *Journal Sentinel*, but they did not propose an additional finding of fact, nor did they point the district court to any such article.

current and retired MDSA members, as well as private businesses, sponsors, and the Milwaukee County Board of Supervisors, which controls the Sheriff's budget.

Deputy Schuh's article mirrored Sheriff Clarke's quote from Deuteronomy, with a few additions that Moses never uttered while outside of the Promised Land:

> Union Member's Response:
> If you are afraid or you have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

According to Deputy Schuh, he learned of Sheriff Clarke's use of officers to patrol his home by viewing an order for that assignment on a roll-call board, and news of the Sheriff's personal escorts to the airport arrived through the "grapevine." Schuh testified that he construed the Sheriff's post as a challenge to his courage, and he wrote his response to "throw back at him what he threw at us." Schuh merely intended to make a sarcastic remark about the Sheriff's courage and did not believe that Clarke was in fact a coward.

On Friday, July 22, 2005, the MDSA distributed the edition of the *Star* containing Schuh's article. Sheriff Clarke, who did not know Deputy Schuh until this incident, was less than pleased by the statement. Later that evening, Clarke called his second-in-command, Inspector Kevin Carr, to discuss an appropriate response.

Clarke settled on reassigning Schuh to a new "Pilot Project," created just for Schuh, that required him to patrol a portion of Milwaukee on foot, in full uniform, and perform various tasks. One objective of the Project was to improve relations with the community, which Schuh would achieve by interviewing residents to determine "what plagues the neighborhood the most" and to "[c]onvince them that we're the good guys/we're on their side and can't succeed without their participation." Another of the stated objectives of the Project was simple: "Visibility." Clarke e-mailed the details of the new assignment to Carr on Saturday, July 23, stating that "We'll identify the census tract. . . . And order him to wear his uniform hat for greater visibility."

Any uncertainty that Sheriff Clarke harbored about where to send Deputy Schuh was resolved the next day, Sunday, July 24, when the *Journal Sentinel* printed a map of a crime-ridden section of Milwaukee's north side. The newspaper characterized the map as the "demographics of a high killing area," described the one-square-mile neighborhood as "the City's deadliest area," and demarcated recent "homicides in Milwaukee's 'hot spot.'" Sheriff Clarke acknowledged reading the article; the reader can undoubtedly see where this tale is headed.

When Deputy Schuh arrived at work on Monday, July 25, he received his plum new assignment. The location to which Clarke assigned Schuh matched precisely the boundaries of "the City's deadliest area." Schuh was told that he must embark on this foot patrol campaign in full uniform, without a partner, and without a squad car. And unlike any other officer, he was required to ride a Milwaukee County Transit bus to and from his new "beat." He received no advance notice of his reassignment, as required by the

parties' collective bargaining agreement. Not surprisingly, Schuh viewed the reassignment as punishment for his statement against Sheriff Clarke.

County authorities and the local media quickly learned of the Sheriff's conduct. On July 27, two days after Schuh's reassignment, the Milwaukee County Board of Supervisors, which oversees the Sheriff's budget, issued an open letter to the Sheriff. The Board expressed its "disgust at the reassignment of Deputy Michael Schuh," criticized the Sheriff's fiscal irresponsibility and "senseless approach" to combating violence, and concluded: "We urge you to reconsider the blatantly shortsighted, irresponsible, and potentially dangerous move of placing a Deputy as a one-man foot patrol in the streets." Deputy Schuh and the MDSA filed a federal lawsuit on the same day, and the media's focus then shifted to the litigation.

On July 29, the *Journal Sentinel* published an editorial cartoon depicting Sheriff Clarke (donning the obligatory ten-gallon cowboy hat) pointing a gun labeled "retaliation" at a picture of Deputy Schuh, only to have it backfire in the Sheriff's face, to which the Sheriff exclaims, "I guess I showed him!"

Schuh served on foot patrol for over one month, from July 25 to September 8, 2005. He was equipped with a radio and stated that he was neither afraid nor threatened while performing his duties. Schuh did not lose any pay or benefits during the Pilot Project, and he was eventually granted his request for a transfer.

On July 28, 2005, only three days after reassigning Deputy Schuh, Sheriff Clarke issued Directive No. 13-05, which formally revised the department's Confidentiality Policy. The original Confidentiality Policy was promulgated in 1984, and a revision had apparently been in the works for some time prior to the controversy surrounding Deputy Schuh. Sheriff's

Office employees proposed an updated policy in 2002, although the revision was never implemented. In July 2005, Captain Eileen Richards, at Sheriff Clarke's direction, drafted the revised policy, relying in large part on the unimplemented 2002 proposal.

The new policy, which remains in effect, differed only slightly from the old. Rather than requiring employees to "keep departmental business confidential," employees now must "keep official agency business confidential." Employees are prohibited from imparting such information "to anyone except those for whom it is intended, or as directed by the Sheriff or his designee, or as ordered by law." The new rule also mandates that no one "shall speak on behalf of the" Sheriff's Office unless authorized to do so.

After Sheriff Clarke issued the revised Confidentiality Policy, Deputy Schuh spoke with the media on multiple occasions regarding his reassignment. He was never disciplined or threatened with discipline under the new Policy. In fact, MDSA president Roy Felber was unaware of any employee disciplined under *either* version of the Policy.

The parties agreed to dismiss, without prejudice, the federal lawsuit that Deputy Schuh and the MDSA filed on July 27, 2005, and on October 7, the plaintiffs filed the present suit in Milwaukee County Circuit Court. Schuh and the MDSA alleged violations of Wisconsin state law and, pursuant to 42 U.S.C. § 1983, that (1) the defendants retaliated against Schuh in violation of his First Amendment rights to free speech and association; and (2) the Department's new Confidentiality Policy constituted an impermissible prior restraint. The defendants removed the action to the United States District Court for the Eastern District of Wisconsin on August 17, 2006.

The parties filed cross-motions for summary judgment, and the district court ruled in favor of Sheriff Clarke and Captain Richards on all federal claims. The court declined to exercise supplemental jurisdiction over the state claims and dismissed the action. Deputy Schuh and the MDSA now appeal, and for the reasons that follow, we agree that summary judgment in defendants' favor was proper.

II. Analysis

Our guiding principles for reviewing a grant of summary judgment are familiar. We review the district court's decision *de novo* and must reverse if we find that a reasonable jury could have rendered a verdict in favor of the MDSA and Deputy Schuh. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The parties filed cross motions for summary judgment, and we construe the evidence in favor of the MDSA and Schuh, the parties against whom the motion under consideration was made. *See Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046, 1051 (7th Cir. 2008).

The MDSA and Deputy Schuh raise two issues on appeal: (1) whether Sheriff Clarke violated Schuh's First Amendment rights by reassigning him to the new Pilot Program; and (2) whether the revised Confidentiality Policy constituted an impermissible prior restraint.

A. First Amendment Retaliation

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits a public employer from retaliating against an employee for engaging in protected speech. *See Callahan v.*

Fermon, 526 F.3d 1040, 1043-44 (7th Cir. 2008). We apply a three-step analysis to a First Amendment retaliation claim under 42 U.S.C. § 1983: (1) the employee's speech must be constitutionally protected; (2) the employer's action must be motivated by the constitutionally protected speech; and (3) if the action was retaliatory, we consider whether the employer has demonstrated that it would have taken the same action irrespective of the employee's speech. *Houskins v. Sheahan*, 549 F.3d 480, 489-90 (7th Cir. 2008); *Kokkinis v. Ivkovich*, 185 F.3d 840, 843 (7th Cir. 1999).

This case turns on whether Deputy Schuh's speech was constitutionally protected, for there is no question that Sheriff Clarke retaliated against Schuh for publishing his statement in the *Star*. Nor can Clarke claim that he would have taken the same action irrespective of Schuh's speech; he did not even know Schuh before the article appeared. The record is crystal clear that Clarke responded to Schuh's remarks by reassigning him to a dangerous neighborhood on a newly created mission of questionable public utility. Sheriff Clarke hand-tailored the task for Schuh alone, wanted him to be overtly visible, and ordered him to take the bus to his new "beat." In our view, Sheriff Clarke's response was a childish and potentially harmful reprisal for a two-sentence statement, and we do not condone his conduct. Apparently our thoughts are consistent with those of the Milwaukee County Board of Supervisors, the media, and the general public. But Sheriff Clarke's conduct, as irresponsible as it may have been, violated Deputy Schuh's First Amendment rights only if the speech was constitutionally protected, and it is upon that question that we must focus.

The government may not "condition public employment on a basis that infringes the employee's

constitutionally protected interest in freedom of expression," *Connick v. Myers*, 461 U.S. 138, 142 (1983), but a public employee's right to free speech is not absolute, *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) ("[A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006).[2] Our goal is "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

To receive First Amendment protection, therefore, a public employee must speak "as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). If he is not so speaking, the employee has no cause of action for First Amendment retaliation, and we need not balance the employee's interests against the government's interest in promoting effective and efficient public services. *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007). Sheriff Clarke disputed below that Schuh was speaking "as a citizen" by writing his article for the *Star*, but he has conceded this point on appeal.[3]

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[2]Sheriff Clarke was also the defendant in Fuerst.

[3]And a wise concession it was. The only connections between Schuh's speech and his employment were that Sheriff Clarke was his superior and that he learned of Clarke's conduct through his position as a deputy. Schuh drafted his statement while off-duty, he reported the conduct externally, and no evidence indicates that the speech was "pursuant to" or "owe[d] its existence to" his official duties. *Garcetti*, 547 U.S. at 421. Consequently, the district

Because Deputy Schuh was speaking as a citizen, we turn to the central question: whether his statement was "on a matter of public concern." To determine this question of law, we must consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Although no factor is singularly dispositive, we have indicated that the content of the speech is the most important of the three. *See Chaklos v. Stevens*, 560 F.3d 705, 714 (7th Cir. 2009); *Cliff v. Bd. of Sch. Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994).

When examining the "context" of a public employee's speech, the employee's motive for speaking is a relevant consideration. *Cliff*, 42 F.3d at 410; *see also Chaklos*, 560 F.3d at 714; *Miller v. Jones*, 444 F.3d 929, 937 (7th Cir. 2006). After all, "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Connick*, 461 U.S. at 145 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). A public employee, familiar with an agency's use of public resources, may be in the best position to raise issues vital to efficient, successful, and legal governance. As the Supreme Court has noted, "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers . . . . Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues." *Roe*, 543 U.S. at 82. At its core, then, the First Amendment should protect speech that *intends* to raise such issues.

But a public employee's motive for speaking is not

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court correctly found that Schuh was speaking as a citizen.

necessarily a dispositive factor, and we have cautioned against creating "an absolute litmus test because [motive] does not supplant content in terms of overall importance to the public concern inquiry." *Cliff*, 42 F.3d at 410; *see also Chaklos*, 560 F.3d at 714; *Miller*, 444 F.3d at 937. Consequently, that a public employee speaks out in part for personal reasons will not necessarily remove the speech from the scope of public concern. *See Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006); *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002); *Zorzi v. County of Putnam*, 30 F.3d 885, 897 (7th Cir. 1994) (" '[T]he mere fact that an employer's statement is an outgrowth of his personal dispute does not prevent some aspect of it from touching upon matters of public concern . . . .' " (quoting *Berg v. Hunter*, 854 F.2d 238, 242 (7th Cir. 1988))).

The motive of a statement, rather, "matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the *only* point of the speech was to further some purely private interest." *Gustafson*, 290 F.3d at 908 (citation and quotations omitted); *see also Button v. Kibby-Brown*, 146 F.3d 526, 529-30 (7th Cir. 1998) ("[S]peech lacks the public concern element if it concerns a subject of public interest but the expression addresses only the personal effect upon the employee." (quotations omitted)). We must analyze the extent that an employee's speech was made for personal reasons in conjunction with the extent to which the content relates to a matter of public concern. *See Metzger v. DaRosa*, 367 F.3d 699, 702 (7th Cir. 2004) (" '[W]here considerations of motive and context indicate that an employee's speech raised a topic of general societal interest merely for personal

reasons rather than a desire to air the merits of the issue, . . . these factors militate against the conclusion that the employee's speech is entitled to First Amendment protection.'" (quoting *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996))).

With these considerations in mind, we turn to Deputy Schuh's statement, which the district court determined to be a purely personal response to Sheriff Clarke's Deuteronomy quote. First, the form of Schuh's statement weighs in favor of constitutional protection; the *Star* is a labor organization newsletter that is distributed beyond Department employees and dedicated to, *inter alia*, political commentary. The effect of the content and context of Schuh's statement, however, is not as clear.

Regarding the content of Schuh's statement, the district court simply stated "Deputy Schuh's article questioned Sheriff Clarke's personal use of department resources." We interpret this to mean that the court found the content to be related to a matter of public interest. Indeed, speech protesting government waste is of legitimate interest to the general public. *See Chaklos*, 560 F.3d at 713. But we are less certain that Schuh's article actually spoke to or protested government waste. Again, Deputy Schuh issued the following statement:

> If you are afraid or you have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

A simple reading of Deputy Schuh's comment indicates that he believed that the Sheriff's need for additional security meant that the Sheriff had "lost [his] courage." Schuh did not comment directly on the department's waste of taxpayer dollars or the impact of the Sheriff's conduct on the availability of officers for more legitimate purposes; our reading of the statement suggests that he focused instead on the Sheriff's lack of courage.[4] Although we ultimately agree that the content of Schuh's statement "related to" a matter of public interest, we do not examine the speech's content in a vacuum, nor do we rely solely on the express language. We comment on the content of Schuh's statement merely to note that any reference to government waste was indirect and tangential, making the *context* a more important consideration when determining whether the speech was on a matter of public concern.

After examining the content *and* context of Schuh's statement, we find that Schuh was speaking on a matter of purely private concern. The context of the speech, which includes the circumstances surrounding its publication and Schuh's motive, indicates that Deputy Schuh responded to what he considered to be a personal challenge to his courage by issuing his own personal challenge to Sheriff Clarke's courage. Sheriff Clarke posted his initial challenge where it would be

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[4]Perhaps a county sheriff's lack of courage, in and of itself, may qualify as a matter of public concern, although the MDSA and Schuh have not raised this argument. We do not doubt that the public would feel safer with courageous lawmen, conjuring up visions of Wyatt Earp patrolling Tombstone and prevailing in the shootout at the O.K. Corral, and Elliot Ness leading his band of "Untouchables" in the quest to bring down Al Capone. But given the ambiguity of Schuh's statement and considering the remaining analysis, we need not address this question.

widely viewed by his subordinates; Deputy Schuh published his retort in a similar forum—an MDSA newsletter distributed to current and retired officers. Although the plaintiffs attempt to link Schuh's article to the controversy that prompted the MDSA to approach the media, nothing suggests that Deputy Schuh intended to bring to light the Sheriff's abuse of county resources, to provoke public discussion about Clarke's conduct, or to air the merits of any related dispute. And most importantly, the language he used in the two-sentence statement does nothing to further such a purpose. Instead, although Schuh's speech may have been of general public interest, it focused solely on "the personal effect upon" Schuh, and "the only point of the speech was to further some purely private interest." *Gustafson*, 290 F.3d at 908 (quotations omitted); *see also Metzger*, 367 F.3d at 702; *Kokkinis*, 185 F.3d at 844.

Deputy Schuh's own testimony reinforces this conclusion. The undisputed facts, based on Schuh's deposition, state the following: Schuh believed that Sheriff Clarke's "inspirational message" was challenging his courage to perform his job; Schuh wrote his article to question Clarke's courage in return; Schuh was responding to the quote on the roll-call board and intended to make a sarcastic comment about Clarke; and Schuh wrote the article to "throw back at him what he threw at us."[5] We can find no

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[5]The plaintiffs assert that the district court overemphasized this component of Schuh's testimony, but Deputy Schuh repeated this phrase three separate times during his deposition. When asked directly why he wrote the article, Schuh answered, after an objection by his counsel that the question was asked and answered, "I wrote the article to throw back at him what he threw at us. That's my, was *the whole purpose of the article*." Further,

evidence in the record that supports plaintiffs' contention that Deputy Schuh had anything but a personal motive for making his statement.[6] *Cf. Chaklos*, 560 F.3d at 713-14 (holding that speech addressing a private interest within a letter containing matters of public interest was protected and noting that "we have emphasized that speech of public importance is only transformed into a matter of private concern when it is motivated *solely* by the speaker's personal interests" (quotations omitted)).

Our case law supports our determination. The parties and the district court each discussed our decision in *Kokkinis*, and we find that Deputy Schuh's speech here represents an even clearer example of the principles we explained in that case. In *Kokkinis*, the plaintiff, a police officer, appeared on a television news program that was reporting on a fellow officer's allegation of sex discrimination by the police chief. 185 F.3d at 842. Kokkinis commented generally on the police chief's "vindictiveness" and claimed that he made many officers' lives miserable. *Id.* Kokkinis was reprimanded and filed suit, and we held that his

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the plaintiffs did not dispute the defendant's proposed findings of fact on this issue, nor did they propose any additional finding of fact regarding Deputy Schuh's motive for writing the article.

[6]The plaintiffs point to two isolated comments that suggest a broader purpose for Schuh's comments. Schuh stated that he disagreed with using deputies to patrol Clarke's residence "[b]ecause I don't think it serves any purpose." And he later stated that he "might have" used some information from a newspaper in writing his article. Plaintiffs did not highlight these comments before the district court, but even if they had, they do not suggest that Schuh intended to raise a matter of public concern, and the undisputed facts state Schuh's clear purpose for submitting his article.

speech was unprotected by the First Amendment because, although sex discrimination in the police department is undoubtedly a matter of public concern, he "had a limited interest in speaking on [that] subject," he knew little about the allegations, and he sought "simply to further his own goal of expressing his displeasure with the Chief's policies." *Id.* at 844.

We recently reached the opposite result in *Chaklos*, finding speech by government employees to be protected because it raised matters of both private *and* public concern. 560 F.3d at 713-14. The plaintiffs in *Chaklos* were employed by the Illinois State Police to train forensic scientists; they also owned an independent forensic services company. *Id.* at 709. When the employees discovered that the police awarded a contract for forensic training without a bidding process, they wrote a letter protesting the contract and stating that their company could provide "substantial savings to the State of Illinois." *Id.* We held that even though the employees clearly had a personal motive for drafting the letter—to procure the business for themselves—they nevertheless also intended to highlight that Illinois was wasting money by employing a non-competitive bid process. *Id.* at 713-14. The employees' purpose in speaking was mixed, the letter's content contained matters of public interest, and the speech deserved protection under the First Amendment. *Id.* at 714.

These two cases illuminate the boundary we draw to determine whether speech addresses a matter of public concern, and we find that Deputy Schuh's article falls on the *Kokkinis* side of the fence. Unlike the letter in *Chaklos*, which contained a matter of public interest because it stated that Illinois was wasting taxpayer money, Schuh's article did not directly question Clarke's fiscal responsibility or raise the public

ramifications of Clarke's conduct. Although a reader may interpret the statement this way, the ambiguity in the content makes the context of the speech more important. The record reveals that Schuh made his statement out of a *purely* personal interest, whereas the plaintiffs in *Chaklos* had a mixed motive for writing their letter. And like the plaintiff in *Kokkinis*, who employed a much more public platform for his comments, Schuh's article in the *Star* "was not designed to address a matter of public concern," 185 F.3d at 844, and the content of his speech does nothing to overcome that fact.

The MDSA and Schuh also cite the public controversy surrounding Sheriff Clarke to support their argument that Schuh's speech merits First Amendment protection, whereas the defendants note that there is no evidence of any media story related to Clarke's misuse of deputies. We agree with the MDSA and Schuh on one point: whether the *Journal Sentinel* published an article is not dispositive of whether Schuh was speaking on a matter of public concern. The pivotal question is not the actual presence of public controversy, but whether the speech might inform the public debate on an issue of legitimate interest to the public at the time it is published. *Cf. Zorzi*, 30 F.3d at 897 n.11 (noting that media coverage is not dispositive of public concern and stating that "[i]t is important not to equate the public's curiosity about a matter with the matter having societal ramifications" (quotations omitted)).

In this case, however, this distinction does not alter our analysis. Although Sheriff Clarke's *retaliation* against Schuh garnered a great deal of media attention, we must still evaluate the full content, context, and form of Schuh's *speech* and determine whether it was on a matter of public concern at the

time it was published.

In the end, Schuh cannot avoid that he wrote his short statement, which on its face merely questioned Sheriff Clarke's courage, for purely personal reasons. The plaintiffs argue that the district court "myopically" neglected the full context of Schuh's speech, particularly because it did not connect his article to the MDSA's initial meeting with the press. Had it done so, the plaintiffs claim, the "point" of the speech would have proven largely immaterial. We do not see how this is so. First, the plaintiffs have not produced evidence, apart from timing, that Sheriff Clarke's Deuteronomy posting *was* in response to the MDSA's meeting with the press. But more importantly, adding this to the context does not alter the outcome. Schuh's reference to the Sheriff's misuse of deputies bolstered his challenge to the Sheriff's courage by providing examples of his purported cowardice.

We do not intend to establish the speaker's motive as the determinative factor in a First Amendment retaliation claim. But where, as here, the public component of Schuh's speech was unstated, indirect, and tangential to his primary purpose, which was a purely personal challenge to the Sheriff, we cannot extend First Amendment protection. We reach this conclusion after carefully considering the entire content, context, and form of Schuh's article. Because we find that Deputy Schuh did not speak on a matter of public concern, we need not proceed to the *Pickering* balancing test, and summary judgment in the defendant's favor was appropriate. *See Metzger*, 367 F.3d at 703.

B. Prior Restraint

We next consider whether Directive No. 13-05, the

revised Confidentiality Policy issued by the Sheriff's Office, is an unconstitutional prior restraint. The MDSA and Deputy Schuh argue that the revised Policy, issued the day after they filed suit, was a direct response to the media coverage of Schuh's reassignment and prevents an employee from divulging "official agency business" to anyone, including when speaking as a citizen on matters of public concern. The district court determined that the Policy was not unlawful, and we review this decision of law *de novo*.

The predecessor to Directive 13-05 stated that "Members shall keep departmental business confidential" and prohibited discussing official information unless directed by a supervisor or as required by law. The relevant portion of the new policy reads:

> It is the policy of the Milwaukee County Sheriff's Office (MCSO) that all Sheriff's Office employees shall keep official agency business confidential. They shall not impart it to anyone except those for whom it is intended, or as directed by the Sheriff or his designee, or as ordered by law. No member of the agency shall speak on behalf of the organization unless authorized to do so by the Sheriff or his designee.

The primary changes to the policy are that "departmental business" became "official agency business," and the Sheriff, rather than an employee's supervisory officer, now possesses the authority to direct the dissemination of such information.

Before reaching the merits of the plaintiffs'

argument, we first note that they may raise a facial challenge to Directive 13-05 even though neither Deputy Schuh nor any other departmental employee has ever been disciplined for violating it or its predecessor. *See Wernsing v. Thompson*, 423 F.3d 732, 743-44 (7th Cir. 2005) (collecting cases and noting that "government employees whose speech is limited by an internal policy or a pre-clearance directive such as [defendant's] need not seek permission to speak or violate the directive in order to challenge the directive in court"). Thus we address the plaintiffs' claim.

The term "prior restraint" describes "'administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Samuelson*, 526 F.3d at 1051 (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). The Supreme Court has explained how we are to determine whether a rule constitutes a prior restraint, *see Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975), but before any restriction may be unconstitutional, it must apply to speech protected by the First Amendment, *Samuelson*, 526 F.3d at 1052 (citing *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465-66 (1995)).

As we mentioned above, a public employee does not have a protected interest in speech unless he is speaking as a citizen on a matter of public concern. *Garcetti*, 547 U.S. at 421; *Treasury Employees*, 513 U.S. at 466. Whereas our earlier discussion concerned whether speech was "on a matter of public concern," we now examine the "citizen" component of this requirement. Public employees who speak pursuant to their official duties "are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421. The Supreme Court explained that such speech "owes its existence to a public employee's professional

responsibilities," and restricting it "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22. The Court did not articulate a framework for determining whether particular speech arose from one's professional duties, but it stated that the inquiry should be "a practical one" not confined to formal job descriptions. *Id.* at 424-25.

Therefore, before balancing the parties' pertinent interests according to the Supreme Court's opinion in *Treasury Employees*, we must first ask whether Directive 13-05 regulates solely unprotected speech, i.e., that which owes its existence to an employee's duties as a Milwaukee County police officer. *See Cruc v. Aiken*, 370 F.3d 668, 678-79 (7th Cir. 2004) (explaining the *Treasury Employees* balancing test and in what cases it applies). The district court answered this question affirmatively and determined that the Policy was not an unlawful prior restraint. The plaintiffs, however, assert that the Policy impermissibly prevents Department employees from relaying *any* information "related to" official agency business, which extends beyond speech made "pursuant to" or that "owed its existence to" an employee's job duties.

Without question, and as the plaintiffs acknowledge, Directive 13-05's prohibition on employee speech "on behalf of the organization" regulates unprotected speech owing its existence to the employee's professional duties. *See Garcetti*, 547 U.S. at 421; *Callahan*, 526 F.3d at 1044. The real dispute in this case is the extent to which the requirement to "keep official agency business confidential" encompasses speech by an employee as a citizen.

We find that Directive 13-05 is not an unlawful prior restraint because it does not apply to speech protected

by the First Amendment. The MDSA and Schuh argue for an expansive interpretation of the phrase "official agency business." They suggest that Directive 13-05 precludes any speech "related to" such business, even though those words do not appear in the Policy itself. We do not read the Policy so broadly. Rather, we find that it regulates only speech "grounded in the public employee's professional duties." *Samuelson*, 526 F.3d at 1052.

The terminology of the Policy, which makes no reference to speech as a citizen, is central to our determination. The Policy covers only "official agency business," a phrase containing three separate components. First, the regulated information must be "business," rather than merely a topic of general interest. Of course, a police department's business may be of public interest, but the term at least removes anything tangentially "related to" the department from its coverage. Second, the term "agency" suggests that the business must be generated by or pertain to the Milwaukee County Sheriff's Office. Third, and in our view most importantly, the regulated information must be "official," which typically means either "[o]f or relating to an office or position of trust or authority," or "[a]uthorized or approved by a proper authority." Black's Law Dictionary 1119 (8th ed. 2004). By requiring the regulated speech to be "official," the Policy properly restricts *only* speech grounded in or owing its existence to the employees' job duties. We trust that the Milwaukee County Sheriff's Office will enforce its policy accordingly, as it has done for approximately twenty-nine years; if it does not, it potentially exposes itself to an as-applied challenge to the Policy or a claim for First Amendment retaliation under the *Connick-Pickering* line of cases described above.

To support their claim that Directive 13-05 was intended to squelch speech protected by the First Amendment, the MDSA and Schuh also emphasize that the Directive was issued the day after they filed their lawsuit. We do not deny that this timing is somewhat suspicious. But according to the record, the Sheriff's Office had been considering revisions for a number of years, and no employee has been disciplined under the new or the old policy. More importantly, the timing does not alter that we must analyze the Policy as a whole and determine whether it regulates protected speech. If the revision was a kneejerk response to the controversy surrounding Deputy Schuh, it certainly did not stifle criticism from officers, employees, and Schuh regarding the Sheriff's misuse of his authority. Department employees have levied countless criticisms against the Sheriff regarding this controversy and others, both before and after the revision, resulting in no discipline under either version of the Policy.

Last, we are not convinced that vesting the authority to permit dissemination of "official agency business" in the hands of Sheriff Clarke or his designee renders the new Policy unlawful. This change alters from whom an employee must seek permission to speak, but it does not expand the *scope* of the speech governed by the new Policy. The Sheriff is still confined by the Policy and may not restrict constitutionally protected speech made by an employee speaking as a citizen. We are confident that both the purpose and language of Directive 13-05 encompass only speech that "owes its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421.

Because the revised Confidentiality Policy regulates only speech not subject to First Amendment protection,

the Policy is not an unlawful prior restraint, *see Samuelson*, 526 F.3d at 1052, and summary judgment in the defendants' favor was appropriate.

III. Conclusion

We find that Deputy Schuh's statement was not on a matter of public concern, and he cannot sustain his First Amendment retaliation claims. We also find that Directive 13-05 is not an unlawful prior restraint. For these reasons, summary judgment was appropriate for all of the plaintiffs' federal claims, and we AFFIRM.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WISCONSIN

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION and MICHAEL SCHUH,

Plaintiffs,

v. Case No. 06-C-900

DAVID A. CLARKE, JR. and
EILEEN RICHARDS,

Defendants.

DECISION AND ORDER

NATURE OF THE CASE

The plaintiffs, Milwaukee Deputy Sheriff's Association and Michael Schuh, initially filed this case in the Circuit Court for Milwaukee County, Wisconsin on October 7, 2005,against defendants David A. Clarke Jr. and Eileen Richards. Subsequently, on August 2,2006, the plaintiffs filed an amended complaint under 42 U.S.C. § 1983, alleging that the defendants violated Deputy Schuh's First Amendment rights of free speech and free association when he was re-assigned from the position of bailiff in the Milwaukee County courthouse to that of a foot-patrol officer in a high crime area of the city. The amended complaint also alleges similar state law claims arising out of the Wisconsin Constitution. On August 17, 2006, the defendants removed the case to federal court.

The parties have filed cross motions for summary

judgment. The motions are fully briefed and will be addressed herein.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. Venue is proper under 28 U.S.C. § 1391. The case was assigned according to the random assignment of civil cases pursuant to 28 U.S.C. § 636(b)(1)(B) and General Local Rule 72.1 (E.D. Wis.). The parties have consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 73.1 (E.D. Wis.).

SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); McNeal v. Macht, 763 F.Supp. 1458, 1460-61 (E.D. Wis. 1991). "Material facts" are those facts that under the applicable substantive law "might affect the outcome of the suit." See Anderson, 477 U.S. at 248. A dispute over "material facts" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The burden of showing the needlessness of a trial – (1) the absence of a genuine issue of material fact and (2) an entitlement to judgment as a matter of law – is upon the movant. In determining whether a genuine issue of material fact exists, the court must consider the evidence in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio

Corp., 475 U.S. 574, 587 (1986).

However, when the nonmovant is the party with the ultimate burden of proof at trial, that party retains its burden of producing evidence which would support a reasonable jury verdict. Anderson, 477 U.S. at 267; see also, Celotex Corp., 477 U.S. at 324 ("proper" summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . ."). "Rule 56(c) mandates the entry of summary judgment, . . . upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322 (emphasis added).

Evidence relied upon in a motion for summary judgment must be of a kind that would be admissible at trial. See Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 n.2 (7th Cir. 1994) (citing Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 849 [7th Cir. 1992]; Fed. R. Civ. P. 56 [e]). Rule 56(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further

affidavits.

(Emphasis added). See also, Halloway v. Milwaukee County, 180 F.3d 820, 827 n.9 (7th Cir. 1999) (upholding district court's exclusion on summary judgment of portions of affidavit as hearsay); see also, Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) ("[H]earsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial.") Therefore, challenges to the admissibility of evidence may be properly brought within the context of a summary judgment motion. Thus, if a proposed finding of fact is not "material" or relevant to the issues in the case, such proposed finding of fact is inadmissible in summary judgment proceedings and is not included in the "relevant facts." See Gustovich, 972 F.2d at 849. A genuine issue of material fact is not shown by the mere existence of "*some* alleged factual dispute between the parties," Anderson, 477 U.S. at 247 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." Anderson, 477 U.S. at 252.

The parties filed cross-motions for summary judgment. However, this fact alone "does not warrant a court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law on the basis of the material facts not in dispute." Mitchell v. McCarty, 239 F.2d 721, 723 (7th Cir. 1957). If material facts are in dispute, neither party is entitled to summary judgment. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 349 (7th Cir. 1983).

RELEVANT FACTS[1]

Plaintiff Michael Schuh is employed as a Milwaukee County deputy sheriff and has held that position since 1987. He was assigned to the jail from 1987 to 1992, to the patrol division from 1992 through 1997, and to the court system from 1997 through July of 2005. The plaintiff had worked as a deputy at the airport for three months in 1997. The plaintiff has never held any office with the Milwaukee County Deputy Sheriff's Association (Association).

Plaintiff Milwaukee County Deputy Sheriff's Association (Association) is a labor organization representing all employees within the Milwaukee County Sheriff's Office holding the rank of deputy and sergeant. Roy Felber has been the Association's president since November of 2004. The Association and Milwaukee County are parties to a collective bargaining agreement covering the wages, hours and terms and conditions of employment of deputies and sergeants.

Defendant David A. Clarke, Jr. is the sheriff of Milwaukee County and has held that position since 2001. Sheriff Clarke has run for sheriff and has been elected in 2002 and 2006.

Defendant Eileen Richards is a deputy sheriff in the Milwaukee County Sheriff's Office and holds the rank of captain. She has been employed with the sheriff's office since 1984 and was promoted to the rank of captain in 2004. From April 2004 to January 2006, her

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[1]Unless accompanied by citation, the relevant facts are taken from the parties joint findings of fact and the parties' proposed findings of fact to the extent they are not disputed. However, citations to sources of quoted excerpts have been included, even when those excerpts are undisputed.

assignment was captain of the "adjutant office." She was the only one assigned as adjutant. In that capacity, her responsibilities included doing various tasks directly for the sheriff, overseeing the Community Facilitators, working hand-in-hand with the public relations officer, helping to schedule and coordinate events and writing policy. According to the Sheriff's Office 2005 Organizational Chart, the adjutant is responsible for overseeing the Community Facilitators, Public Information, Administrative Services, and Open Records. One of Captain Richards' responsibilities was updating and revising the sheriff's office policies and procedures manual.

In 1984, the sheriff's department issued the following rules as part of its policies and procedures manual.

RULE 36 – CONFIDENTIAL INFORMATION

Members shall keep departmental business confidential. They shall only discuss or give official information as follows:

(1) As directed by their supervisory officer;
(b) As required by law.

RULE 66 – USE OF RECORDS

Records of the department shall be used for official purposes only.

COMMENT: Tampering with records by members of the department is prohibited.

The 1984 Rules (Rule 36 and Rule 66) did not prevent Association President Felber from carrying out his functions as Association president.

In 2002, then Captain Feiton and Captain Mascari, who were working in the Internal Affairs Division, drafted a proposed change to Rule 36 and Rule 66 which combined the two rules into one. The proposed change provided as follows:

> No member shall maintain, at their residence or any other location outside the Milwaukee County Sheriff's Office, any official Milwaukee County Sheriff's Office file or duplicate thereof, whether in manual or electronic format, without prior permission of the Sheriff or his/her designee. Members shall be allowed to keep copies of reports they have personally authored and their personal performance evaluations; all other Milwaukee County Sheriff's Office records are restricted to official purposes only. No member shall release information contained within any record, report, teletype, or photograph without prior permission of the Sheriff or his/her designee or unless required by law.

The sheriff's office never implemented the proposed change.

Sometime in July of 2005, Sheriff Clarke directed Captain Richards to revise and create a new policy for confidential information. Captain Richards utilized the draft prepared by Captains Mascari and Feiton, the 1984 policies, and the confidentiality provisions of the

Milwaukee Police Department Rules to prepare a draft proposal that was circulated to various members of the command staff. Ultimately, the draft was put in its final format as Directive 13-05.

On July 28, 2005, by order of the sheriff, Directive No. 13-05 was issued. It provided as follows:

RE: POLICY & PROCEDURE 202.05
Confidential Information

202.05.0 Purpose

The purpose of this policy is to make certain that personnel understand the necessity to maintain the confidentiality of agency business and operations in order to ensure that an accurate dissemination of information is provided to those inquiring about organization business.

202.05.1 Policy

It is the policy of the Milwaukee County Sheriff's Office (MCSO) that all Sheriff's Office employees shall keep official agency business confidential. They shall not impart it to anyone except those for whom it is intended, or as directed by the Sheriff or his designee, or as ordered by law. No member of the agency shall speak on behalf of the organization unless authorized to do so by the Sheriff or his designee.

Members shall not maintain at their

> residence or any other location outside the Milwaukee County Sheriff's Office any official Milwaukee County Sheriff's Office file, report or memo or duplicate thereof, whether in manual or electronic format without prior permission of the Sheriff or his designee. Members shall be allowed to keep copies of reports that they have personally authored and their personal performance evaluations; all other Milwaukee County Sheriff's Office records are restricted to official purposes only.
>
> No member shall release information containing any record, teletype, or photograph without prior permission from the Sheriff or his designee or unless required by law.

Captain Richards could not recall whether any employee has been investigated for violating Directive 13-05. She did not know whether any employee has been disciplined for violating Directive 13-05.

Association President Felber was not aware of any employee being disciplined under the 1984 Rules or under Directive 13-05. However, he did recall one particular sergeant, Jose Lopez, who had been investigated by Internal Affairs for allegedly violating Directive 13-05 when he provided the media with information about an employee discipline issue. Sergeant Lopez retired from the department before the Internal Affairs investigation was concluded.

Deputy Schuh was never threatened with or actually disciplined for violating Rule 13.05. After the adoption of the new rule, Deputy Schuh gave interviews to both

the print media and television and was not disciplined under the rule. Following the adoption of Rule 13.05, members of the leadership of the Association, including President Felber, continued to make comments and to criticize the sheriff in the "Star" newsletter without being charged with violating the rule.

In 2005, prior to Deputy Schuh's "Star" article, the Association went to the local media with their concerns that Sheriff Clarke was using deputies for personal purposes, such as escorting him at the airport and making rounds of his personal residence.

The Sheriff's Office has a Community Facilitators Unit with the general purpose of building community rapport, building community block watches, determining citizen issues through community group meetings, and recruiting. On February 22, 2005, the Sheriff's Office posted an inter-office communication to "all sworn personnel" asking interested employees to submit a request for a transfer into the Community Facilitator Unit. (Deposition of Eileen Richards [Richards Dep.], Exh. 2). Deputy Schuh did not respond to the February 22, 2005, posting, but approximately ten other employees did. Three of these employees were transferred into the Community Facilitator Unit.

In mid-June 2005, Sheriff Clarke posted a phrase on several roll-call bulletin boards that read as follows:

> If you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others.
>
> Deuteronomy, Chapter 20, Verse 8.

Such a roll-call posting would be seen by most of the

sworn staff. Prior to that roll-call posting, Deputy Schuh had seen other "inspirational messages" or quotes sent out by the sheriff for display at roll-call. He had not been offended by those messages, but he was offended by the sheriff's roll-call message. He felt that the sheriff was challenging him and other deputies regarding whether they had the courage to do their job.

The "Star" is an Association newsletter published and distributed to current members and retired members of the Association. It is also distributed to members of the County Board and businesses who advertise in the "Star." The Association has extended an offer to the sheriff to submit articles to the "Star," which the sheriff has done twice.

Articles in the "Star" are authored by officers and members of the Association, retired members, or agents of the Association. The "Star" includes articles on various topics, such as current events, coming events, recipes and opinion pieces. Among other things, the "Star" contains political editorial articles submitted by Association members which gives them an opportunity to express their feelings. The articles will be printed as long as the articles are not distasteful, such as containing vulgar language or sexual content. The "Star" has included a variety of articles critical of Sheriff Clarke which were authored by deputies.

Deputy Schuh responded to the roll-call message by writing an article in the July 2005 edition of the "Star." His article was published in the section of the "Star" entitled "Sacred Cow," a part of the newsletter that had existed in the "Star" for a long time prior to Deputy Schuh's article. Deputy Schuh's article stated:

Union Member's Response:

> If you are afraid or you have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

Deputy Schuh learned of the assignment of deputies to patrol past Sheriff Clarke's residence from seeing an order posted on the roll call board. He heard "through the grapevine" that the sheriff had two deputies and a sergeant escort him whenever he goes to the airport. (Deposition of Michael Schuh [Schuh Dep.] at 24-25). Deputy Schuh believed that his article questioned Sheriff Clarke's courage, but he personally did not believe that Sheriff Clarke was a coward or that he was not courageous. He wrote the article to "throw back at him what he threw at us." (Schuh Dep. at 31). Deputy Schuh was responding to the quote on the roll call board and he intended to make a "sarcastic" comment about the sheriff. (Schuh Dep. at 30). Deputy Schuh believed that Sheriff Clarke's message was challenging him about whether he had the courage to do his job.

The edition of the "Star" that included Deputy Schuh's article was made available mid-day on Friday, July 22, 2005. Sheriff Clarke did not know who Deputy Schuh was until he read his "Star" article.

Sheriff Clarke and Inspector Kevin Carr spoke by telephone about the article the evening it came out. The sheriff was not happy about how he was portrayed in the article. During that telephone conversation, the

sheriff and Inspector Carr discussed the possibility of re-assigning Deputy Schuh. Sheriff Clarke has ultimate control over transferring or reassigning employees within the Sheriff's Department, including the plaintiff. Sheriff Clarke, not the employees, decides where his employees will be assigned within the Sheriff's Office. He can effectuate an employee's re-assignment or transfer by simply sending out an email. Sheriff Clarke does not care where his employees prefer to be assigned; the employees go where the sheriff tells them to go.

On Saturday, July 23, 2005, at 8:51 p.m., the sheriff sent an email to Inspector Carr and Captain Richards from his personal email account. The subject of the email was "Schuh," and the body of the email read as follows:

> Kevin [Carr], here's his assignment. We'll identify the census tract. We'll have to work out the logistics of radio comm etc. He can figure out the rest like contacting MPD comm, district, squad in the area, etc. And order him to wear his uniform hat for greater visibility.

The email had a document attachment entitled "PILOT PROJECT.doc," which was a one page document providing as follows:

> **PILOT PROJECT**
>
> **OBJECTIVE/GOAL:**
> To better connect with the community in order to engage them in taking back control of their neighborhood and making their neighborhoods safe. Visibility.

RESOURCES:
Foot Patrol

TASKS:
Based on areas where violence is occurring, make contact with every home/business in the area to meet the resident/owner and determine what plagues the neighborhood most. Find out what resources they need. Encourage them to take control of their neighborhood by actively participating e.g. calling police, writing down info to give to police once they arrive in order to help ID the perps/instigators/bad actors in the neighborhood. Convince them that we're the good guys/we're on their side and can't succeed without their participation.

Collaborating with Milwaukee Police, DA/Community Prosecutors, Project Safe Neighborhood, Probation/Parole, alderman, Co. Supervisor, city Dept. of Neighborhood Services, state rep and senator etc for resources that will lead to a comprehensive strategy to restore order and turn over control of the neighborhood back to local residents.

Massive field interview effort to determine who frequents the area, find crime guns. Record/Wanted checks. Create a data base. Identify drug houses and other problem houses in the area. Look at crime data, calls for service

> (multiple calls etc) and any other data that may be helpful. Determine owner/renter. Identify the investment owner and work with DNS to bring the property into compliance. REMOVE ALL ABANDONED CARS FROM STREETS ALLEYS AND YARDS.

Beginning the "Pilot Project" was completely up to Sheriff Clarke and it was his idea. The sheriff decided that he wanted Deputy Schuh to fill the "Pilot Project" position. Neither Milwaukee County nor any other body required the sheriff to request volunteers or to require employees to take an examination for positions within the "Pilot Project." Sheriff Clarke formulated Deputy Schuh's assignment without the help of Inspector Carr or Captain Richards. The sheriff simply provided Captain Richards with instructions as to what he wanted done. Deputy Schuh could have been disciplined for insubordination, but was not.

On Sunday, July 24, 2005, a Journal Sentinel article printed a map of a high crime area which the article designated as "demographics of high killing area." The article identified a square mile section on the City's north side. Sheriff Clarke read this newspaper article.

On July 25, 2005, Deputy Schuh received an inter-office communication detailing his new assignment. The geographic area Deputy Schuh was assigned to was the same census tract that had been identified in the July 24, 2005, Journal Sentinel article. Deputy Schuh was transferred on July 25, 2005, from his assignment in the Milwaukee County court system to a new program under the Community Facilitator Unit called the "Community Initiative Program." Following this reassignment, Deputy Schuh's pay and benefits remained the same. He was transferred to the new

assignment because of his article in the "Star". Deputy Schuh was not enthusiastic about performing his tasks as a community facilitator. He did not believe the assignment was useful and he also believed he was being punished.

Deputy Schuh's new assignment was foot patrol initially with no partner, which was the sheriff's idea. Prior to this assignment, no such assignment existed as part of the Community Facilitator Unit. Deputy Schuh was to report to and return from his foot patrol assignment via a Milwaukee County Transit bus. No one in the Community Facilitator office had county transit as their sole means of getting to and from their assignment.

During his foot patrol assignment, Deputy Schuh was in uniform, armed and equipped with a radio. He worked the day shift from 8:00 a.m. to 4:00 p.m. and was not afraid while on the foot patrol assignment. Deputy Schuh was not threatened by anyone he encountered, nor did he observe anyone with a firearm.

Deputy Schuh was on foot patrol on his assigned duty days from July 25, 2005, through September 8, 2005. He was on light duty from September 9, 2005, through February 20, 2006, during which time he was not working the foot patrol assignment. Upon return to full duty work on February 20, 2006, Deputy Schuh was assigned a squad car. With the exception of one foot patrol lasting one and a half hours on March 8, 2006, Deputy Schuh did no foot patrol after September 8, 2005. Deputy Schuh eventually requested, and was granted, a transfer to the Mitchell International Airport.

On July 27, 2005, the plaintiffs filed a federal action, Case No. 05-C-804, against defendants David A. Clark, Jr., and Eileen Richards. A summons was issued to the defendants on August 4, 2005. On October 6, 2005, the

parties filed a stipulation to dismiss the case in its entirety without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Subsequently the plaintiffs filed this action in Milwaukee County Circuit Court. This case was then removed to federal court.

ANALYSIS

Defendants' Motion for Summary Judgment

At the outset, the defendants assert that Deputy Schuh was not speaking as a citizen when he authored the "Sacred Cow" article. Specifically, the defendants assert that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and, therefore, are not insulated from "managerial discipline" based on such statements. The defendants cite Garcetti v. Ceballos, 547 U.S. 410 (2006) and Mills v. City of Evansville, Ind., 452 F.3d 646 (7th Cir. 2006), in support of their position.

The defendants maintain that similar to the police sergeant in Mills, Deputy Schuh was commenting on an issue unique to the operation of the office of the sheriff. The defendants acknowledge that Deputy Schuh's direct responsibility as a deputy was not to criticize orders concerning the sheriff's personal security arrangements. They assert, however, that the information he learned was unique to his position. Specifically, the defendants assert that Deputy Schuh obtained information that Sheriff Clarke used escorts at the airport through a conversation with another deputy. Additionally, the defendants assert that Deputy Schuh learned of the fact that the sheriff had requested patrol at his residence from a roll call board Deputy Schuh observed. The defendants contend that

the information Deputy Schuh learned and commented on was information available to him because of his particular position.

The plaintiffs assert that Garcetti does not apply to the facts of this case. The plaintiffs maintain that Deputy Schuh's speech did not involve the duties which the sheriff's office paid him to perform – that being a courthouse bailiff. The plaintiffs assert that the fact that Deputy Schuh was not at work when he spoke and was not speaking to a supervisor within the department supports their assertion that Garcetti does not apply. Finally, the plaintiffs contend that contrary to the defendants' assertion, neither Garcetti nor any Seventh Circuit Court of Appeals case addresses the relevancy of how the information was obtained. Rather, the plaintiffs contend that the controlling issue is the capacity in which the information was distributed. The plaintiffs assert that Deputy Schuh's speech is appropriately examined under Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983).

The First Amendment, as made applicable to the states through the Fourteenth Amendment, "protects, under certain circumstances, a public employee's right to speak as a citizen about matters of public concern." Callahan v. Fermon, 526 F.3d 1040, 1044 (citing Garcetti, 547 U.S. at 420-21). An employer may not retaliate against an employee for engaging in protected speech. Massey v. Johnson, 457 F.3d 711, 716 (7th Cir. 2006).

Following the Supreme Court's decision in Garcetti[2],

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[2]In Garcetti, 547 U.S. at 421, the court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment

the Court of Appeals for the Seventh Circuit explained: "Garcetti made clear that public employees speaking pursuant to their official duties are speaking as employees, not citizens, and thus are not protected by the First Amendment regardless of the content of their speech." Spiegla v. Hull, 481 F.3d 961, 965 (7th Cir. 2007). Thus, the court held that the "threshold inquiry [after Garcetti] is whether the employee was speaking as a citizen; only then do we inquire into the content of the speech." Spiegla, 481 F.3d at 965.

"For a government employee's speech to qualify for First Amendment protection she must have been speaking 'as a citizen on a matter of public concern.'" Tamayo v. Blagojevich, 526 F.3d 1074, 1091 (7th Cir. 2008) (quoting Garcetti, 547 U.S. at 418). When determining whether a public employee spoke as a citizen, the question presented is whether the employee made his statement pursuant to his official duties. Id. This inquiry is a practical one. Callahan, 526 F.3d at 1044 (citing Garcetti, 547 U.S. at 424).

Employers, however, cannot restrict employees' rights by creating excessively broad job descriptions. See Garcetti, 547 U.S. at 424. "Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." Id. at 424-25. Additionally, the location and audience of the employee's speech are not dispositive. Callahan, 526 F.3d at 1044. The speech may be protected even if it is made by an employee at his place

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purposes, and the Constitution does not insulate their communications from employer discipline."

of work to his coworkers. Id. (citing Garcetti, 547 U.S. at 420). Moreover, the subject matter of the speech is not dispositive – the "'First Amendment protects some expressions related to the speaker's job.'" Id. (quoting Garcetti, 547 U. S. at 421). The "controlling factor" is whether the speech "'owes its existence to a public employee's professional responsibilities.'" Id. at 1044 (quoting Garcetti, 547 U.S. at 421).

In this case, the undisputed facts establish that in mid-June, Sheriff Clarke posted a phrase on several roll-call bulletin boards that read as follows:

> If you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others.

Deuteronomy, Chapter 20, Verse 8. This roll-call message offended Deputy Schuh. In response to the message, Deputy Schuh wrote an article that was published in the "Sacred Cow" section of the "Star," an Association newsletter published and distributed to members and retired members of the Association.

The undisputed facts further establish that Deputy Schuh wrote the article while off duty. Additionally, his article although it related to his job was not written as a part of his duties as a courthouse bailiff. Moreover, contrary to the defendants' assertions, the fact that Deputy Schuh learned of the facts about the airport from "the grapevine" or a co worker and the patrol from an order posted on the roll call board while employed as a deputy sheriff is not dispositive. Deputy Schuh's article did not "owe its existence to [his] professional responsibilities." See Callahan, 526 F.3d at 1044. Thus, Deputy Schuh was speaking as a citizen.

The defendants assert that even if Deputy Schuh

was speaking as a citizen, he was not speaking on a matter of public concern. According to the defendants, to determine whether the speech is on a matter of public concern, the court considers the content, form and context of the speech. The defendants maintain that while the content of the speech is the most important consideration, the motive behind an employee's statements is a relevant consideration as well.

The defendants assert that at the time Deputy Schuh wrote his response to Sheriff Clarke's quotation, the "'issue' of the patrols was long over." (Brief in Support of Defendants' Motion for Summary Judgment [Defendants' Brief] at 8). According to the defendants, Deputy Schuh's motive in writing the article was that he felt the sheriff "was challenging me about whether I had the courage to do my job." (Schuh Dep. at 15). The defendants maintain that Deputy Schuh's comments in the Association's newsletter were no different than the comments made by the officer in Kokkinis v. Ivkovich, 185 F.3d 840, 843 (7th Cir. 1999). The defendants assert that the "Sacred Cow" article was the same type of personal attack growing out of another issue as in Kokkinis.

Finally, the defendants assert that if the plaintiff spoke as a citizen on a matter of public concern, application of the Pickering balancing test would result in a conclusion as a matter of law that the speech was not protected. Specifically, the defendants assert that Deputy Schuh chose to ignore the chain of command and opted to "take on" the sheriff in the Association's newsletter which was received by all deputies. The defendants assert that Deputy Schuh had opportunities to raise his concerns through the proper channels and that challenging an elected sheriff's courage in a union newsletter when you have

no personal belief that the individual lacks courage is hardly the type of comment designed to promote unity in the Sheriff's Department.

In response, the plaintiffs contend that the form and content of Deputy Schuh's speech related to a matter of public concern. The content, according to the plaintiffs, related to the sheriff's questionable allocation of department resources to benefit him personally. The plaintiff asserts that issues involving proper allocation of police patrols and other departmental resources "are questions of serious public import," quoting Gustafson v. Jones, 290 F.3d 895, 906 (7th Cir. 2002).

Additionally, with respect to the form of Deputy Schuh's speech, the plaintiffs assert that the union newsletter was a place for political editorial and was distributed to current and retired employees, as well as Milwaukee County Board members and businesses who advertise in the newsletter. According to the plaintiffs, it was likely to reach many people who would be interested in it. Nevertheless, the plaintiffs assert that regardless of whether a member of the public actually took interest in the article is not dispositive, citing Wright v. Illinois Dept. of Children & Family Services, 40 F.3d 1492, 1501-02 (7th Cir. 1994).

The plaintiffs further assert that the context of Deputy Schuh's speech related to a matter of public concern. Specifically, the plaintiffs contend that Deputy Schuh responded as a union member and used the opportunity to expose the sheriff's mis-allocation of department resources. The plaintiffs maintain that, applying the Pickering balancing test to the facts of this case demonstrate that the record contains no evidence of actual or potential disruption.

Because Deputy Schuh was speaking as a citizen,

the court must inquire into the content of his speech. The court must determine whether Deputy Schuh's speech was constitutionally protected. Vukadinovich v. Board of School Trustees of North Newton School Corp., 278 F.3d 693, 699 (7th Cir. 2002). This is a question of law which requires application of the two-part Connick-Pickering test. First, the court must determine whether the plaintiff's speech addressed a matter of public concern. If the answer is "yes," the court must balance "the employee's interest 'as a citizen in commenting on the matter' against the public employer's interest 'as [a]n employer[ ] in promoting effective and efficient public service.'" Spiegla, 481 F.3d at 965 (quoting Spiegla v. Hull, 371 F.3d 928, 939 [7th Cir. 2004], cert. denied, 128 S.Ct. 441 [2007] [Spiegla I]).

In determining whether Deputy Schuh's speech addressed a matter of public concern, Connick requires the court to consider "the content, form, and context" of Deputy Schuh's statement as revealed by the record as a whole. Cliff v. Board of School Com'rs of City of Indianapolis, Ind., 42 F.3d 403, 409 (7th Cir. 1994) (quoting Connick, 461 U.S. at 147-48). Decisions of the court of appeals for this circuit indicate that of these three factors, content is the most important. Cliff, 42 F.3d at 410. The motive which underlies an employee's statements is a relevant, but not necessarily dispositive, factor. Id.

"'The fact that an employee has a personal stake in the subject matter of the speech does not necessarily remove the speech from the scope of public concern.'" Phelan v. Cook County, 463 F.3d 773, 791 (quoting Button v. Kibby-Brown, 146 F.3d 526, 529 [7th Cir. 1998]). However, if the speech "concerns a subject of public interest but the expression addresses only the personal effect upon the employee," it lacks the public

concern element. Phelan, 463 F.3d at 791 (quoting Button, 146 F.3d at 529-30).

Thus, "[w]here considerations of motive and context indicate that an employee's speech raised a topic of general societal interest merely for personal reasons rather than a desire to air the merits of the issue, or for the sole purpose of bolstering [his] own position in a private personnel dispute with [his] superiors, these factors militate against the conclusion that an employee's speech is entitled to First Amendment protection." Metzger v. DaRosa, 367 F.3d 699, 702 (7th Cir. 2004) (quoting Campbell v. Towse, 99 F.3d 820, 827 [7th Cir. 1996] [internal citations and quotation marks omitted]). It is necessary to "look at the point of the speech in question: was it the employee's point to bring wrong doing to light? Or to raise other issues of public concern? Or was the point to further some purely private interest." Kokkinis, 185 F.3d at 844 (quoting Callaway v. Hafeman, 832 F.2d 414, 417 [7th Cir. 1987]).

In this case, the undisputed facts establish that in mid-June, Sheriff Clarke posted a phrase on several roll call bulletin boards that read as follows:

> If you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others.

Deuteronomy, Chapter 20, Verse 8. This roll-call message offended Deputy Schuh and, in response, he wrote an article that was published in the "Sacred Cow" section of the association's newsletter, the "Star." The article stated:

> If you are afraid or you have lost your courage and need two deputies and a

> sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

With respect to the first factor, content of the statement, Deputy Schuh's article questioned Sheriff Clarke's personal use of department resources. With respect to the second factor, the form of the statement, the Association newsletter was a place for political editorial and was distributed to current and retired employees as well as the Milwaukee County Board and businesses who advertised in the Association.

With respect to the third factor, the context of the statement, Deputy Schuh believed his article questioned the sheriff's courage, although he did not personally believe that Sheriff Clarke was not courageous. Rather, Deputy Schuh wrote the article to "throw back at him what he threw at us." (Schuh Dep. at 31). Deputy Schuh felt that the sheriff "was challenging [him] about whether [he] had the courage to do [his] job." (Schuh Dep. at 15). Deputy Schuh intended to make a "sarcastic comment" about the sheriff. (Schuh Dep. at 31).

The plaintiffs assert that if the only motive for Deputy Schuh's article was the biblical quote, "then one would think the Star article's content would have been limited thereto." (Plaintiff's Reply Brief in Opposition to Defendants' Motion for Summary Judgement [Plaintiff's Reply Brief] at 7). However, the undisputed facts establish that Deputy Schuh did not write the article to bring to light the propriety of the sheriff's use of department resources. Sheriff Clarke's use of department resources was tangential to the

message of the article. Deputy Schuh wrote the article in reaction to the biblical quote which he perceived as a personal challenge to his courage. The article did not address the sheriff's use of department resources to bring the issue of use of department resources to light or to foster discussion about the issue. Deputy Schuh wrote the article to address the personal grievance – Sheriff Clarke's use of an inspirational message relating to courage.

In Kokkinis, the court of appeals for this circuit "applying Connick, held that while '[t]he issue of sex discrimination in public employment is, of course, a matter of public concern,' the plaintiff, a police officer who criticized the police chief's record on sex discrimination on a local television news show, was not speaking on a matter of public concern because the record reflected that he 'had a limited interest in speaking on the subject of sex discrimination within the police department.'" Phelan, 463 F.3d at 791 (quoting Kokkinis, 185 F.3d at 844).

Similarly, the issue of proper allocation of police patrols and other departmental resources, as well as matters of police protection and public safety, are matters of public concern. However, the context of Deputy Schuh's article reveals that his "purpose was to advance [his] personal interests." See Phelan, 463 F.3d at 791. The plaintiffs provide no evidence that the point of Deputy Schuh's speech was to raise a matter of public concern.

Because Deputy Schuh's speech did not address a matter of public concern, the court need not decide whether under Pickering, the defendants' interest as an employer in providing effective and efficient services outweighed Deputy Schuh's interest as a citizen in commenting upon the matter of concern. See Cliff, 42 F.3d at 409. Accordingly, the defendants'

motion for summary judgment will be granted with respect to the plaintiffs' First Amendment retaliation claim and the plaintiffs' motion for summary judgment will be denied with respect to the plaintiffs' First Amendment retaliation claim.

Directive 13.05

The defendants assert that Directive 13.05 does not constitute an unlawful prior restraint upon the plaintiffs' First and Fourteenth Amendment rights to free speech and association. Specifically, the defendants contend that the confidentiality rule is valid irrespective of whether the rule is evaluated under Pickering, 391 U.S. at 568 or United States v. National Treasury Employees Union, 513 U.S. 454, 465 (1995). The defendants also maintain that the decision in Milwaukee Police Ass'n v. Jones, 192 F.3d 742 (7th Cir. 1999), impliedly approves of the rule.

To the contrary, the plaintiffs assert that Directive No. 13-05 constitutes a prior restraint on future speech. Specifically, the plaintiffs maintain that rather than punishing speech that has already been communicated, Directive No. 13-05 prevents employees from imparting any "official agency business" to anyone. According to the plaintiffs, Directive No. 13-05 was the direct result of the "media storm" that erupted as news of Deputy Schuh's reassignment spread throughout the community. (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs Motion for Summary Judgment [Plaintiff's Brief] at 21). The Association, on behalf of Deputy Schuh and the rest of its members, filed a lawsuit on July 27, 2005, alleging unlawful retaliation. Directive 13-05 was issued the next day.

The term "prior restraint" is used to describe "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Samuelson v. LaPorte Community School Corp., 526 F.3d 1046, 1051 (7th Cir. 2008) (quoting Alexander v. United States, 509 U.S. 544, 550 [1993]). A restriction is a prior restraint of it meets four elements: (1) the speaker must apply to the decision maker before engaging in the proposed communication; (2) the decision maker is empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the communication; (3) approval of the application requires the decision maker's affirmative action; and (4) approval is not a matter of routine, but involves "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the decision maker. Id. (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554 [1975]). The doctrine of prior restraint recognizes "the time-honored distinction between barring speech in the future and penalizing past speech." Alexander, 509 U.S. at 554.

The court first must determine whether the policy applies to speech that is protected by the First Amendment. Samuelson, 526 F.3d at 1052. "For the restriction to qualify as a prior restraint, the employee must have an interest in the speech as a citizen commenting upon a matter of public concern." Id. (citing United States v. National Treasury Employees Union, 513 U.S. 454, 465-66 [1995]; Crue v. Aiken, 370 F.3d 668, 678 [7th Cir. 2004]). As previously discussed, the Garcetti court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." 547 U.S. at 421.

The undisputed facts establish that while Directive

13-05 was issued the day after the plaintiffs filed suit, Captain Richards, the author of the revised rule, drafted it several weeks prior to July 28, 2005. Additionally, although the lawsuit was filed on July 27, 2005, it was not served on the defendants until August 4, 2005. The undisputed facts also establish that a previous policy, issued in 1984, provided:

> **RULE 36 – CONFIDENTIAL INFORMATION**
>
> Members shall keep departmental business confidential. They shall only discuss or give official information as follows:
> (1) As directed by their supervisory officer;
> (b) As required by law.
>
> **RULE 66 – USE OF RECORDS**
>
> Records of the department shall be used for official purposes only.
>
> COMMENT: Tampering with records by members of the department is prohibited.

Directive No. 13-05 relates to maintaining the confidentiality of agency business and operations. It requires employees of the sheriff's office to "keep official agency business confidential" and prohibits any "member of the agency [from] speak[ing] on behalf of the organization unless authorized to do so by the Sheriff or his designee." The directive prohibits any "member [from] releas[ing] information containing any record, teletype, or photograph without prior

permission from the Sheriff or his designee or unless required by law."

Directive No. 13-05 does not constitute a prior restraint because it does not restrict any speech protected by the First Amendment. Directive No. 13-05 restricts speech related to official agency business, prohibits agency members from speaking on behalf of the organization and prohibits agency members from releasing information containing a record, teletype or photograph. Such speech would be "grounded in the public employee's professional duties and therefore is not protected by the First Amendment." Samuelson, 526 F.3d at 1052.

Accordingly, the defendants' motion for summary judgment as to the plaintiff's claim that Directive 13-05 is a prior restraint in violation of the First Amendment will be granted. The plaintiffs' motion as to this claim will be denied.

Plaintiffs' Motion for Summary Judgment

In addition to responding to the defendants' motion for summary judgment, the plaintiffs assert that the defendants' retaliation violated Deputy Schuh's and the Association's First Amendment right to free association and Deputy Schuh's rights under chapter 164 of the Wisconsin statutes. The plaintiffs assert that Deputy Schuh's claim for infringement of his right to associate freely parallels his claim for infringement of his right to speak freely. The plaintiffs assert that the fact that the defendants retaliated against Deputy Schuh for his writing in the Association newsletter would discourage other employees from actively participating in the union or writing articles in its newsletter – exactly the type of discouragement the Constitution protects. The plaintiffs cite Connick, 461

U.S. at 144-45, to support their position. The plaintiffs further assert that the Court of Appeals for the Seventh Circuit has recognized that "[u]nions are among the quintessential types of associations the First Amendment freedom of association protects," quoting Marshall v. Allen, 984 F.2d 787, 799 (7th Cir. 1993). Thus, the plaintiffs maintain that since the union activity at issue in this case related to a matter of public concern, it was constitutionally protected from retaliation by the free association guarantees of the First Amendment in the same way as Deputy Schuh's speech.

The court has determined that Deputy Schuh's speech did not address a matter of public concern. Therefore, the union activity at issue in this case, like the speech, is not constitutionally protected from retaliation by the free association guarantees of the First Amendment. Accordingly, the plaintiffs' motion for summary judgment with respect to their First Amendment claim will be denied.[3] The plaintiffs also have asserted a claim grounded on Chapter 164 of the Wisconsin Statutes.

The plaintiffs assert that Chapter 164, which is entitled the "Law Enforcement Officers' Bill of Rights," affords all Wisconsin law enforcement officers, including Deputy Schuh, the right to freely engage in political affiliation without fear of adverse employment

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[3]In this case, because the court concluded that the defendants did not violate the plaintiffs' First Amendment rights to free speech or free association, it will not address whether the defendants are entitled to qualified immunity. See Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 597 (7th Cir. 1997) ("[B]ecause we find that there was no constitutional violation, it is unnecessary to consider whether [the officers] were entitled to qualified immunity.")

consequences. Specifically, the plaintiffs assert that Wisconsin law enforcement officers have the right to freely engage in political activity, or refrain therefrom, while off-duty and not acting in their official capacity. Section 164.015 of the Wisconsin statutes provides: "No law enforcement officer may be prohibited from engaging in political activity when not on duty or not otherwise acting in his official capacity, or be denied the right to refrain from engaging in political activity." The plaintiffs assert that Deputy Schuh's "Star" article was not written or distributed while he was on-duty or operating in his official capacity and was not written on behalf of the department. The plaintiffs further assert that although Chapter 164 does not define "political activity," the editor of the "Star" described the publication as containing political editorial that will be published as long as it is tasteful.

The plaintiffs maintain that the defendants discriminated against Deputy Schuh because he exercised his rights under Wis. Stat. § 164.015. Chapter 164 prohibits an employer from retaliating against a law enforcement officer: "No law enforcement officer may be discharged, demoted or denied promotion, transfer or reassignment, or otherwise discriminate against in regard to employment, or threatened with any such treatment, by reason of the exercise of the rights under this chapter." Wis. Stat. § 164.03.

Jurisdiction over any state law claims alleged by the plaintiffs is based on the supplemental jurisdiction statute, 28 U.S.C. § 1367. The statute provides that a district court "may decline to exercise supplemental jurisdiction" over the pendant state law claims if the court has dismissed all claims over which it has original jurisdiction. Wright v. Associated Ins. Companies Inc., 29 F.3d 1244, 1251 (7th Cir. 1994).

A district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state law claims. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988). In the usual case in which all federal claims are dismissed before trial, the balance of these factors will point to declining to exercise jurisdiction over any remaining pendent state law claims. Hence, the general rule is that when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state law claims rather than resolving them on the merits. Wright, 29 F.3d at 1251 (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 [1966]).[4]

The appellate court has set forth the following guideline for determining whether supplemental jurisdiction should be exercised after the federal claim has been dismissed: "[A] federal court must choose the course that 'best serves the principles of economy, convenience, fairness and comity which underlie the pendent jurisdiction doctrine.'" Centres, Inc. v. Town of Brookfield, Wis., 148 F.3d 699, 704 (7th Cir. 1998) (quoting City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 533 [1997]) (Internal citations omitted.) The interests of judicial economy counsel that jurisdiction be retained when the appropriate disposition of the state claim is clear.

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[4]There are three well recognized exceptions to the rule: These include "when the statute of limitations has run on the pendent state law claim, precluding the filing of a separate suit in state court," or "when 'substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort,' " or "when it is absolutely clear how the pendent state claims can be decided." Wright, 29 F.3d at 1251.

Centres, Inc., 148 F.3d at 704 (citing Rothman v. Emory University, 123 F.3d 446, 454 [7th Cir. 1997] and Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 [7th Cir. 1993]).

As previously stated, in exercising its discretion, the general principle is that when federal claims in a suit have been dismissed, balancing the factors to be considered under the pendent jurisdiction doctrine, "judicial economy, convenience, fairness, and comity," will generally indicate that jurisdiction over state law claims be relinquished. Carnegie-Mellon University, 484 U.S. at 350 n. 7; Wright, 29 F.3d at 1251. In this case, there are issues of state law which are most properly resolved by the state courts.

Upon due consideration of the facts and circumstances surrounding the plaintiff's remaining claims, this court deems it appropriate to relinquish jurisdiction over the plaintiff's state law claims.

ORDER

NOW, THEREFORE, IT IS ORDERED that the plaintiffs' motion for summary judgment be and hereby is **denied** as stated herein (Docket #38).

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be and hereby is **granted** as stated herein (Docket #24).

IT IS FURTHER ORDERED that this action be and hereby is **dismissed**.

FINALLY IT IS ORDERED that the clerk of court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 15th day of August, 2008.

BY THE COURT:

s/ Patricia J. Gorence
PATRICIA J. GORENCE
United States Magistrate Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION and MICHAEL SCHUH,

Plaintiffs,

v. CASE NUMBER: 06-C-900

DAVID A. CLARKE, JR. and EILEEN RICHARDS,

Defendants,

☒ **Decision by Court**. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants' motion for summary judgment be and hereby is granted.

IT IS ALSO ORDERED that this action be and hereby is dismissed.

August 18, 2008
Date

Jon Sanifilippo
Clerk

s/M. Murawski
(By) Deputy Clerk

Approved this 18th day of August, 2008

s/Patricia J. Gorence
Patricia J. Gorence, U.S. Magistrate Judge

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(2)

No. 09-460

Supreme Court, U.S.
FILED
NOV 18 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION AND MICHAEL SCHUH,

Petitioners,

v.

DAVID A. CLARKE, JR. AND EILEEN RICHARDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals improperly apply *Connick v. Myers* by over emphasizing the motivation of the speaker – the context of the speech – in determining whether the employee spoke on a matter of public concern?

2. Did the Seventh Circuit improperly apply *Garcetti v. Ceballos* by finding that the Confidentiality Policy of the Milwaukee County Sheriff's Department did not constitute an improper prior restraint on protected First Amendment speech?

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STATEMENT OF THE CASE

The Respondents, Milwaukee County Sheriff David A. Clarke, Jr. and Captain Eileen Richards, respectfully request that the Petition for Writ of Certiorari be denied.

The decision of the Seventh Circuit Court of Appeals was based on established precedent and the court correctly found that Petitioner Michael Schuh's speech was not protected under the First Amendment to the U.S. Constitution, as it did not touch on a matter of public concern. The Seventh Circuit properly looked at the "content, form and context" of the speech in question and determined that Deputy Schuh's sarcastic comments in the Union newsletter did not touch on a matter of public concern under this Court's holding in *Connick v. Myers,* 461 U.S. 138 (1983) and its progeny.

The Seventh Circuit also correctly found that the Milwaukee County Sheriff Department's Confidentiality Policy (Rule 13.05) did not constitute an improper prior restraint, as the confidentiality policy only restricted speech not protected by the First Amendment.

Nothing in the record before this Court warrants the granting of the Petition for Writ of Certiorari.

CLARIFICATION OF THE RECORD

A. Respondents' version of the facts

In its Statement of Facts to this Court, Petitioners have introduced disputed facts as well as matters which were not proposed as factual findings. The additional facts contained herein are intended to supplement and to clarify several misrepresentations contained in Petitioners' Statement of Facts.

B. Schuh's Reassignment

After the Memorial Day weekend in 2005, Milwaukee Deputy Sheriff's Association (hereinafter "Association") President Roy Felber spoke with Milwaukee Journal Sentinel reporter David Umhoefer about patrols of Sheriff David A. Clarke's residence and escorts at the airport. (R. 44, ¶ 115). No newspaper stories about the issue are in the record. (R. 46, ¶¶ 116-117; R. 50, ¶¶ 116-117).

In mid-June of 2005, Clarke posted a quotation from Deuteronomy on several roll-call bulletin boards. (R. 30, ¶ 12). Contrary to Petitioners' Statement of the Case, there is nothing in the record to suggest any connection between the roll-call posting and any "controversy" over the Sheriff's personal security detail. It was common practice for Clarke to post "inspirational messages" or other quotations at roll-calls. (R. 30, ¶ 13).

On July 22, 2005, the Milwaukee Deputy Sheriff's Association distributed an edition of its

newsletter, the *Star,* which contained Deputy Schuh's sarcastic retort to the Sheriff's roll-call posting. The retort consisted of two sentences and did not question the use of Milwaukee County Sheriff Department's resources for the Sheriff's personal benefit. (R. 30; ¶ 18).

Schuh believed that Clarke's roll-call quotation challenged his courage. (R. 27, ¶ 113; R. 36, ¶ 113). Schuh, therefore, wrote his response to "throw back at him what he threw at us." (R. 27, ¶ 112). Schuh's intent was to respond to the Sheriff's inspirational message and make a sarcastic comment about the Sheriff. (R. 27, ¶ 112; R. 36, ¶ 112). Schuh understood that his message questioned Clarke's courage, although he personally did not believe Sheriff Clarke was a coward or that he lacked courage. (R. 27, ¶ 111; R. 36, ¶ 112).

Schuh learned of the patrol of Clarke's residence by seeing an order on a roll-call board. (R. 27, ¶ 109; R. 36, ¶109). He learned through the "grapevine" that the Sheriff had an escort at the airport. (R. 27, ¶ 108; R. 36, ¶ 108).

Clarke responded to Schuh's sarcastic quip by transferring him from his bailiff position to the Community Facilitator Unit. (R. 30, ¶¶ 23-24). Schuh was assigned to patrol an area of Milwaukee's inner city during the day – he was always in uniform, armed and carried a police radio. (R. 30, ¶ 26). Schuh was not enthusiastic about the assignment and viewed it as punishment. (R. 30, ¶ 25). However, he

was not afraid during the assignment and was never threatened. (R. 30, ¶ 26).

Schuh worked on foot patrol in the Community Facilitator's Unit from July 25, 2005 through September 8, 2005. (R. 30, ¶ 27). For the balance of his time on the assignment, he had a squad car, and he eventually was reassigned, at his request, to the airport. (R. 30, ¶¶ 27, 29). Schuh lost no pay or benefits as a result of the reassignment. (R. 30, ¶ 28).

C. Confidentiality Policy – Rule 13.05

Since at least 1984, the Sheriff's Department had rules restricting the disclosure of official department business. (R. 30, ¶ 6). The original rule required employees to keep "departmental business confidential." (R. 30,¶ 6).

In July of 2005, Clarke directed Captain Eileen Richards ("Richards") to redraft the existing departmental confidentiality rules. Richards prepared a draft revision, relying on previously proposed revisions, the City of Milwaukee Police Department rules and the existing policy. (R. 30, ¶ 8). The draft proposal was circulated to various members of the command staff and was ultimately issued in final form on July 28, 2005. (R. 30, ¶¶ 8-9). The new rule required that employees "keep official agency business confidential." (R. 30, ¶ 9).

Schuh gave numerous interviews to both the print and television media after the adoption of the

new confidentiality rule and was never disciplined. (R. 27, ¶¶ 103-104; R. 36, ¶¶103-104). Association President Felber objected to the confidentiality rules as being vague and unclear. (R. 27, ¶ 101; R. 36, ¶ 101). However, he was unaware of any employee ever being disciplined for violating either the old or the new confidentiality rule. (R. 30, ¶ 11). There is no evidence in the record that the adoption of the new Rule 13.05 was related to Schuh's comment in the Association's newsletter.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT SCHUH'S SPEECH DID NOT TOUCH ON A MATTER OF PUBLIC CONCERN BY CONSIDERING THE CONTENT, FORM AND CONTEXT OF HIS SPEECH UNDER *CONNICK V. MYERS*.

A. The Seventh Circuit did not place an improper emphasis on the "context" of the speech at issue.

It is well-established that a public employee's speech is entitled to constitutional protection only if the employee is speaking as a citizen on a matter of public concern; speech is not entitled to protection if the employee is speaking "as an employee upon matters only of personal interest." *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004); *Connick*, 461 U.S. at

147; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Whether an employee's speech addresses a matter of public concern must be determined by the "content, form and context" of a given statement, as revealed by the record as a whole. *Rankin v. McPherson*, 483 U.S. 378 (1987) (citing, *Connick*, 461 U.S. at 147-48).

While the Seventh Circuit has noted that no factor is singularly dispositive, it has stated that the "content" of the speech is the most important factor. *See, e.g., Chaklos v. Stevens*, 560 F.3d 705, 714 (7th Cir. 2009); *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *Gustafson,* 290 F.3d at 907; *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996); *Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis*, 42 F.3d 403, 409 (7th Cir. 1994).

This does not mean that the other prongs under *Connick* should be ignored or that the motive of the speaker may not be important, as urged by Petitioners. In *Connick*, an assistant district attorney circulated a questionnaire within her office "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. The Court ruled that the content of only one question touched upon a "matter of interest to the community" – that concerning pressure to work in political campaigns. This Court considered the motivation of the speaker when it noted that the focus of Myers' questions was "not to evaluate the performance of the

office, but rather to gather ammunition for another round of controversy with her superiors." *Id.* at 148. As this Court noted, "these questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre*." *Id.* at 148. Although Myers was motivated by her desire to avoid a transfer to another department, this Court nevertheless found that the speech was protected because of the strong underlying interest of the community to avoid public employees being pressured to work on political campaigns. *Id.* at 149-50. While not dispositive, the motivation of the speaker was a relevant consideration in *Connick*.

The speaker's motivation was also relevant in *Rankin*, where both the majority and the dissent focused on what McPherson [the public employee] was trying to express. The majority looked at the motive for her speech when it analyzed the context of McPherson's speech by considering her criticism of the President's policies which immediately preceded her alleged protected comment. *Rankin*, 483 U.S. at 386-87. Indeed, the dissent was critical of the majority's emphasis on the speaker's motivation in determining whether the speech touched on a matter of public concern. *Id.* at 396-97.

The *Connick* decision also supports the proposition that certain statements, i.e., those touching on core First Amendment values or inherent public concerns, will survive the threshold test even if the employee was partially motivated by personal concerns. *Id.* at 148-49. Consistent with that notion,

the Seventh Circuit has noted "that a public employee speaks out in part for personal reasons will not necessarily remove the speech from the scope of public concern." (App. 12); *citing Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006); *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002); *Zorzi v. County of Putnam*, 30 F.3d 885, 897 (7th Cir. 1994) ("[T]he mere fact that an employer's statement is an outgrowth of his personal dispute does not prevent some aspect of it from touching on matters of public concern. . . ."). The Seventh Circuit did not exclusively look at the context of Deputy Schuh's comment. The court correctly applied *Connick* and cogently and thoroughly examined the "content, form *and* context" of the comments as revealed by the whole record. (App. 11-19). It did not consider Schuh's motivation's myopically.

The court first noted that the "form" of Schuh's statement weighed in favor of constitutional protection; the newsletter included political commentary and was distributed beyond Department employees. (App. 13).

With respect to the "content" of the speech, the court was not convinced that Schuh's statement actually spoke to or protested government waste, as found by the district court. The Seventh Circuit found that a simple reading of Schuh's comment reflected that he did not comment directly on the waste of taxpayer dollars or the impact of the Sheriff's conduct on the availability of officers for more legitimate purposes. (App. 14). In fact, a person reading Schuh's comments would be hard-pressed to understand its

intended message unless the person was familiar with the background. That was also the case in *Connick*, where the Court noted that the questionnaire prepared by Meyers, if released to the public, would not convey any meaningful information. *Connick*, 461 U.S. at 148. While the appellate court reluctantly found that the content of Schuh's speech related to a matter of public concern, the fact that any reference to governmental waste was indirect and tangential, resulted in the "context" of the speech becoming more important.

The court did not place an impermissible emphasis on the context – the motivation of the speaker. Rather, the court found that under the circumstances, the context of the speech warranted a finding that the speech was not protected. Indeed, Schuh's testimony concerning his motivation was quite telling. When asked why he issued the retort in the Association's newsletter, Schuh responded that he wanted to "throw back at [Sheriff Clarke] what he threw at us." He intended to make a sarcastic comment about the Sheriff's courage, although he did not believe that the Sheriff lacked courage.

Not unlike the plaintiff in *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999), who employed a much more public platform for his comments, Schuh's comments in the *Star* were not designed to address a matter of public concern. Schuh's purely personal motivation in making the comments, when coupled with the limited public concern as revealed by the content of his speech, resulted in a correct finding by

the Seventh Circuit that Schuh's speech did not touch on a matter of public concern.

B. There is no split in the circuit courts concerning the proper application of *Connick*.

Petitioners have alleged a split in the circuit courts concerning the application of the three-prong test under *Connick*. They assert that several circuit courts have improperly emphasized the motivation of the speaker, while other courts have completely ignored motivation in determining whether speech touches on a matter of public concern. A review of the circuit courts' decisions concerning this element fails to reveal any divergence in the application of the *Connick* test.

Petitioners first contend that the Sixth, Tenth and Eleventh Circuits have placed "extensive emphasis" on the motivation to the detriment of the other two factors under *Connick*. This is simply not accurate.

The Eleventh Circuit has consistently applied the *Connick* test and noted that all three elements must be considered, as revealed by the record as a whole. *Morris v. Crow,* 117 F.3d 449, 457 (11th Cir. 1997) (*citing Morgan v. Ford,* 6 F.3d 750, 754 (11th Cir. 1993)). The Eleventh Circuit noted that while an employee's motivation is not dispositive, it is *a* factor that should be considered in determining whether speech touches on a matter of public concern. *Mitchell*

v. Hillsborough County, 468 F.3d 1276, 1283-84 (11th Cir. 2006) (*citing Morris*, 117 F.3d at 457). The fact that the Eleventh Circuit has discussed the motive of the speaker in certain circumstances does not mean that the court is misapplying the *Connick* test. Indeed, in discussing the relative import of each of the three prongs, the Eleventh Circuit recently noted that "content" is the most important factor in assessing whether speech touches on a matter of public concern. *Mitchell,* 468 F.3d at 1284. The Eleventh Circuit has not improperly elevated "context" as being more important than "content" or "form" under the *Connick* inquiry.

The Sixth and Tenth Circuit Courts of Appeals have similarly stressed that all three factors, including the content and form of the speech, are important considerations under *Connick*. For instance, in its decision in *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006), the court noted that each of the three factors must be considered and that the entire speech does not have to address matters of public concern, as long as some portion of the speech does. *Id.* at 256-57.

Even in *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2003), a decision cited by Petitioners, the Sixth Circuit noted that it was guided by *Connick,* which the court described as the "most instructive case on this issue." *Id.* at 589. In analyzing the speech, the court noted that the employee's motive for engaging in the speech was relevant, but not dispositive. The court correctly noted that defendant's argument that the

speaker's motivation was dispositive of whether the speech touched on a matter of public concern, was in direct conflict with *Connick*. *Id.* at 591-92.

The Tenth Circuit has likewise not improperly elevated the motive of the speaker. The *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) decision cited by Plaintiff involved an English-only policy and the question of whether the policy involved a prior restraint on protected speech. Even in that context, the court noted that "content, form and context" were all relevant considerations of whether the policy restrained speech touching on a matter of public concern. *Id.* at 1310. Indeed, the Tenth Circuit has consistently considered the content, form and context of the speech under *Connick*. *See, e.g., Brammer-Hoelter v. Twin Peaks Charter Academy,* 492 F.3d 1192, 1205 (10th Cir. 2007); *Schrier v. University of Colorado*, 427 F.3d 1253, 1263 (10th Cir. 2005); *Lee v. Nicholl,* 197 F.3d 1291, 1295 (10th Cir. 1999).

Petitioners also contend that the First, Second and Fourth Circuits apply *Connick* without considering the motivations of the speaker. This is also incorrect.

Petitioners cite to the decision in *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007) for the proposition that the Fourth Circuit employs an improper test under *Connick*. To support that claim, they note that the court found that a letter touched on a matter of public concern even though the bulk of the letter related to a personal grievance. That notion

is correct and comes directly from this Court's decision in *Connick*, where the Court wrote that the entire speech does not have to address matters of public concern, as long as some portion of the speech does. *Connick*, 461 U.S. at 149.

The Fourth Circuit has indeed considered motivation as a relevant factor in applying the *Connick* test. *See Harris v. City of Virginia Beach,* 69 F.3d 532, fn. 7 (4th Cir. 1995) (noting that Fourth Circuit case law has stressed the significant role that context plays in combination with content and form); *Dennison v. County of Frederick*, 921 F.2d 50, 54 (4th Cir. 1990) ("Although [plaintiff's] allegations appear to be of public interest, when they are considered in the context of what actually occurred . . . they are more properly viewed as essentially a 'private' matter between employer and employee.").

In *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995), the plaintiff was speaking to a neighborhood organization about zoning issues facing a proposed real estate development. In the course of that meeting, he gave legal advice to the assembled members of the organization that tended to undermine an earlier managerial decision that his supervisor made. DiMeglio's supervisor reprimanded him and transferred him to a new assignment. The Fourth Circuit upheld the supervisor's actions by finding that DiMeglio's speech was not protected because he expressed a personal opinion, and the self-serving aspect of his behavior was an important

consideration in the court's decision to affirm the personnel actions taken against him. *Id.* at 804.

The Second Circuit similarly has considered the speaker's motive. In *Lewis v. Cowen*, 165 F.3d 154 (1999), the circuit suggested that in analyzing whether speech touched on a matter of public concern, "the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Id.* at 163-64. Yet, the court does not believe that the speaker's motive is dispositive. *See Sousa v. Roque*, 578 F.3d 164 (2d Cir. 2009); *Reuland v. Hynes*, 460 F.3d 409, 411 (2d Cir. 2006) ("the speaker's motive, while one factor that may be considered, is not dispositive as to whether his speech addressed a matter of public concern."); *Cioffi v. Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006) ("although the speaker's overall motivation was personal, that fact was not dispositive.").

The First Circuit similarly has held that the inquiry into the content, form and context of speech may require an analysis of the speaker's motive. *See Barron v. Suffolk County Sheriff's Dept.*, 402 F.3d 225 (1st Cir. 2005) ("public employee's speech that would not necessarily qualify, on the basis of its content alone, as a matter of inherent public concern . . . may require a more complete *Connick* analysis into the form and context of the public employee expression 'as revealed by the record as a whole.'"); *Mullins v. Town of Fairhaven*, 284 F.3d 31 (1st Cir.

2002); *Alinovi v. Worcester Sch. Comm.*, 777 F.2d 776, 787 (1st Cir. 1985) (concluding that speech found to be motivated by a purely personal issue did not implicate matter of public concern, notwithstanding the attenuated connection between the speech and the incident raising First Amendment concerns.).

In sum, none of the Circuit Courts of Appeal referenced by Petitioners have improperly applied the *Connick* inquiry to its First Amendment retaliation jurisprudence by either elevating context over content or form, or by ignoring the context of the speech all together. A Writ of Certiorari is not warranted on Petitioner's First Amendment free speech claim.

II. THE SEVENTH CIRCUIT PROPERLY FOUND THAT THE CONFIDENTIALITY POLICY DID NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT UNDER THE FIRST AMENDMENT.

A. The Seventh Circuit never found that a public employee's speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection under *Garcetti v. Ceballos*.

Petitioners completely misconstrue the Seventh Circuit's holding that the Sheriff 's Department's confidentiality policy did not constitute an impermissible prior restraint on protected speech. Petitioners argue that under *Garcetti v. Ceballos,* 547 U.S. 410 (2006), a

public employee who utters a statement as a citizen, based on information learned through his employment, is necessarily entitled to First Amendment protection.

Their rationale is fatally flawed for several reasons. First, the Seventh Circuit did not find that the confidentiality policy in question "restrict[ed] speech not made pursuant to the job duties of public employees," as urged by Petitioners. (Brief, p. 26). Rather, the court interpreted the Sheriff Department's confidentiality policy narrowly and found that it only applied to information grounded in the employee's official duties, which is not protected by the First Amendment. *Garcetti*, 547 U.S. at 421-22; *Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046, 1052 (7th Cir. 2008).

Second, Petitioner's argument is flawed because it assumes that all speech made as a citizen is protected, regardless of the source of the information and/or whether it touches on a matter of public concern. This is incorrect, as not all restrictions constitute unlawful prior restraints. For a restriction to qualify as an unlawful prior restraint, the employee must have an interest in the speech as a citizen commenting on a matter of public concern. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465-66 (1995); *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004). Public employees who speak pursuant to their official duties "are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421. Therefore, a policy that only regulates speech

that owes its existence to an employee's official duties is not prohibited by the First Amendment.

B. The Sheriff Department's Confidentiality Policy did not prohibit speech protected by the First Amendment.

The Seventh Circuit did not expand the scope of *Garcetti v. Ceballos,* in addressing the Sheriff's Departments Confidentiality Policy, as the court did not find that the confidentiality policy restricted speech not made pursuant to the job duties of a public employee.

In addressing the Sheriff's Department's Confidentiality Policy, which required law enforcement officers to keep "official agency business confidential," the Seventh Circuit concluded that the policy did "not apply to speech protected by the First Amendment." (App. 22-23). While Petitioners had argued for an expansive interpretation of the phrase "official agency business," the Seventh Circuit declined to read the policy so broadly, and rather found that the policy only regulated speech "grounded in the public employer's professional duties." (App. 23). The Seventh Circuit interpreted the confidentiality policy narrowly by focusing on the inclusion of the terms "official," "agency" and "business," and in particular the term "official." The court found that the inclusion of such limiting terms meant that the policy was intended by the Sheriff's Department to only restrict official

business "grounded in the public employee's professional duties." (App. 19-25).

As such, because the confidentiality policy only regulated speech that was "grounded in the public employee's professional duties," the court found that the policy was not an impermissible prior restraint. (App. 23). This is so because speech that is "grounded in the employee's professional duties," is not protected by the First Amendment, regardless of the role in which it is spoken. *Garcetti*, 547 U.S. at 421-22; *Samuelson*, 526 F.3d at 1052 (*citing Garcetti* and holding that the school district's chain of command policy did not constitute a prior restraint because it only restricted speech that was grounded in the employee's professional duties, which was not protected by the First Amendment.)

The Seventh Circuit's decision in this case did not stray from these well-settled principles. Just as in *Samuelson,* where the court narrowly interpreted the school district's chain of command policy, the Seventh Circuit here narrowly interpreted the Sheriff Department's Confidentiality Policy to only restrict speech that was not protected by the First Amendment.

That interpretation was supported by the record which did not reveal any employees being disciplined for violating the policy. The policy did not appear to deter speech either, as Schuh provided several public interviews about the Sheriff and his policies and was never disciplined.

Nothing in the Seventh Circuit's decision concerning the department's confidentiality policy warrants Supreme Court review.

CONCLUSION

For the reasons articulated herein, Respondents request that the Supreme Court deny the Petition for Writ of Certiorari.

Dated this 18 day of November, 2009.

Respectfully submitted,

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In The
Supreme Court of the United States

Milwaukee Deputy Sheriff's Assciation and
Michael Schuh,
Petitioners,

v.

David A. Clarke Jr., and
Eileen Richards,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The questions presented by this case implicate the free speech rights of public employees across the United States. This case requires guidance from this Court to determine the appropriate amount of emphasis given to a public employee's motivation for speaking in determining whether he or she spoke on a matter of public concern. The free speech rights of public employees are further implicated by determining whether speech made by a public employee as a citizen, but based on information learned through public employment, is protected by the Constitution.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY FOCUSED ON MOTIVATION UNDER THE *CONNICK V. MYERS* TEST.

A. The Supreme Court of the United States has not allowed an employee's motivation for speech solely to determine whether that speech related to a matter of public concern.

Despite Respondents' suggestion to the contrary, the Petitioners have never argued that the context of employee speech is irrelevant under this Court's precedents. The argument contained in the Petition for Writ of Certiorari is that placing extensive emphasis on employee motivation for speech, and thereby allowing it to become dispositive, is improper.

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari apparently misses this point.

This Court has never applied *Connick v. Myers* to hold that speech purely motivated by personal interests is unprotected by the Constitution. (Pet. 11-16). Indeed, Ms. Myers' motivation in *Connick* was purely personal. 461 U.S. 138, 148-49 (1983). According to Respondents, "[t]he *Connick* decision also supports the proposition that certain statements, . . . will survive the threshold test even if the employee was partially motivated by personal concerns." (Br. Opp'n. 7). Petitioners agree, but contend that *Connick* goes even further, and stands for the proposition that even statements *completely* motivated by personal concerns can survive the threshold test.

The Petitioners disagree with the Respondents' analysis of *Rankin v. McPherson*. According to the Respondents, both the majority and dissent in *Rankin* focused on the employee's motivation for speaking. (Opp. Brief, 7). Both the majority and dissent, however, analyzed the context of the employee's speech and how it related to the specific words she spoke. 483 U.S. 378, 386-87, 396-97 (1987). The context was relevant in determining whether she spoke on a matter of public concern, not in determining her motivation for speaking.

The Respondents in no way address the analysis of three Supreme Court cases contained in the petition. All three cases: *United States v. National Treasury Employees' Union; City of San Diego v. Roe; and Garcetti v. Ceballos*, support the proposition that speech entirely motivated by personal interests can survive the threshold *Connick* inquiry. (Pet. 14-16).

B. The Seventh Circuit improperly focuses on the motivation for employee speech.

The Respondents' Brief quotes a portion of the Seventh Circuit's decision in support of their argument that the court correctly applied *Connick*. (Br. Opp'n. 8). The Seventh Circuit stated "that a public employee speaks out *in part* for personal reasons will not necessarily remove the speech from the scope of public concern." (App. 12) (emphasis added). This quote demonstrates the misapplication of Supreme Court precedent by the Seventh Circuit. Even if a public employee speaks out *solely* for personal reasons, the Petitioners contend that speech is not necessarily removed from the scope of public concern. The motivation for a public employee's speech is not determinative, as a court must evaluate the content, form, and context in order to determine whether that speech touched on a matter of public concern. *Connick*, 461 U.S. 138, 147-48 (1983).

As noted in both the Petition for Writ of Certiorari, and the Brief in Opposition to the Petition for Writ of Certiorari, the Seventh Circuit has stated that no factor is singularly dispositive under the *Connick* analysis, but that the "content" of the speech is the most important factor. (Pet. 19; Br. Opp'n. 6; App. 11). Despite these statements, however, the Seventh Circuit's legal reasoning has repeatedly, and incorrectly, focused on the motivation for employee speech. (Pet. 16-21).

The Seventh Circuit's analysis in the instant case demonstrates its misapplication of Supreme Court precedent. The Seventh Circuit found that two parts of the *Connick* test weighed in favor of finding that

Deputy Schuh's speech was on a matter of public concern, namely the form and content of the speech. (App. 13-14). After determining Deputy Schuh spoke with a purely personal motivation, the Seventh Circuit allowed motivation to trump form and content and determined Deputy Schuh was not speaking on a matter of public concern. (App. 19). As discussed above, even assuming Deputy Schuh was speaking with a purely personal motivation, that alone is not enough to disqualify his speech from protection.

C. The courts of appeals are in disarray over the proper application of *Connick*.

The Respondents misstate the argument contained in the Petition for Writ of Certiorari on this issue. The Petitioners do contend that several circuit courts have improperly emphasized the motivation of the speaker in applying *Connick*, but do not argue that other courts have completely ignored motivation. (Br. Opp'n. 10). Instead, the amount of emphasis given to motivation in the *Connick* analysis is the point on which the courts of appeals have split. The Petitioners contend that motivation can be relevant when performing the *Connick* test to determine whether the context of speech was on a matter of public concern, but should not be dispositive.

The cases cited in the Respondents' Brief in Opposition from the Eleventh Circuit actually support the argument that the Eleventh Circuit misapplies Supreme Court precedent. "[W]hen context and motivation are considered, even speech that, content-wise, lies near the core of the First Amendment's protection - archetypical public speech - may be deemed private speech." *Mitchell v. Hillsborough*

County, 468 F.3d 1276, 1284 (11th Cir. 2006) (*citing Morris v. Crow*, 117 F.3d 449, 457 (11th Cir. 1997)). *Morris* involved speech where only the content weighed in favor of protection, while the form and context weighed against. *Morris*, 117 F.3d at 457. The Eleventh Circuit assumed, without deciding, that the speech at issue was on a matter of public concern. *Id.*

The Sixth Circuit's decision in *Farhat v. Jopke* is another instance where the reasoning applied by the court does not match the standards it supposedly used to determine whether a public employee spoke on a matter of public concern. The Respondents' Brief in Opposition notes isolated statements made by the Sixth Circuit concerning the non-dispositve nature of the motivation for employee speech. (Br. Opp'n. 11-12). The legal reasoning applied by the court, however, focuses entirely on the motivation for the employee speech. *Farhat*, 370 F.3d 580, 593 (6th Cir. 2003).

The legal reasoning applied by the Tenth Circuit in *Maldonaldo v. City of Altus*, also does not conform to the standards the court of appeals set forth. The Tenth Circuit focused almost exclusively on whether the speech or the speakers at issue intended to communicate any message by speaking Spanish. *Maldonaldo v. City of Altus*, 433 F.3d 1294, 1310-13 (10th Cir. 2006). This analysis focused on the motivation for speaking.

Finally, the Respondents misstate the Petitioners' argument concerning the First, Second, and Fourth Circuits. The Petitioners do not contend that these courts of appeals fail to consider the motivation for speech. Rather, the Petitioners contend these courts

of appeals do not consider motivation dispositive in determining whether speech is on a matter of public concern. Motivation certainly is one aspect of the context inquiry, but it is not, and should not, be dispositive.

II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE CONFIDENTIALITY POLICY CONSTITUTES AN IMPERMISSIBLE PRIOR RESTRAINT UNDER THE FIRST AMENDMENT.

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari fails to note the crucial distinction between the holding in *Garcetti v. Ceballos*, and the Seventh Circuit's decision in the instant case. Speech made pursuant to the job duties of public employees, according to *Garcetti*, is not entitled to First Amendment protection. *Garcetti*, 547 U.S. 410, 421 (2006). If Richard Ceballos' speech had merely concerned the subject matter of his employment, without being made pursuant to his job duties, then a full *Connick* analysis would have been required. *Id.*

The Respondents argue that the confidentiality policy is not an impermissible prior restraint on speech because the Seventh Circuit interpreted it narrowly. Specifically, the Seventh Circuit "found that it only applied to information grounded in the employee's official duties, which is not protected by the First Amendment." (Br. Opp'n. 16) (*citing Garcetti*, 547 U.S. at 421-22). This statement misconstrues the holding of the Supreme Court. *Garcetti* held that speech made pursuant to an employee's job duties is not spoken as a citizen, and therefore, the speech is not protected. 547 U.S. at 421. The case said absolutely nothing

about removing speech from protection if it is based on information learned through employment. A public employee can still speak as a citizen based on information learned through public employment, as long as the employee does not speak pursuant to his job duties.

CONCLUSION

For all the foregoing reasons in both this Reply Brief and the Petition for Writ of Certiorari, Petitioners respectfully request that the Supreme Court grant the petition and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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